HOSPITAL MEDIA NETWORK, LLC *v.* JAMES G. HENDERSON ET AL.
(AC 43986)

Prescott, Moll and Suarez, Js.

Syllabus

The defendant H, a former employee of the plaintiff, appealed from the judgment rendered on remand awarding damages to the plaintiff for H's breach of fiduciary duty. The plaintiff had employed H as its chief revenue officer until 2013 when it fired him for cause. Thereafter, the plaintiff brought an action against H, claiming, among other things, that he breached his fiduciary duty to the plaintiff by working for G Co., a private equity investment firm, to raise capital to acquire C Co., which was involved in the same business sector as the plaintiff, while he was employed by the plaintiff, during regular business hours, and without the plaintiff's permission or knowledge. G Co.'s acquisition of C Co. closed in 2013 shortly after H's employment was terminated, at which time H was paid a $150,000 finder's fee by either G Co. or C Co., was awarded a three year consulting contract with C Co. at $50,000 annually, and was given the opportunity to purchase restricted stock of C Co. H was defaulted for failure to comply with a discovery order and the trial court granted the plaintiff's motion for judgment on the default. Following a hearing, the trial court rendered judgment for the plaintiff and awarded damages against H. H appealed to this court, which reversed the judgment only as to the award of damages against him, concluding that the award did not achieve a just result, as it failed to take into account the equities of the case, and remanded the case for a new hearing in damages. On remand, the trial court rendered judgment

in favor of the plaintiff in the amount of $323,545.84, which represented H's 2013 salary, certain consulting fees paid to H by the plaintiff, the finder's fee, and one year's worth of consulting fees under the consulting contract, and H appealed to this court. *Held*:

1. In rendering its judgment, the trial court acted within the scope of this court's remand order by making its own independent factual findings on the basis of the entire record before it and relying on those findings to assess the equities in the case: this court did not issue a circumscribed remand order binding the trial court to the factual findings in the first action but, rather, reversed the decision as to the damages award against H and remanded the case for a new hearing in damages; moreover, given that the record on remand included additional evidence, it followed that the trial court necessarily made its own findings on the basis of the totality of the evidence in the record and, in light of those findings, considered the relevant equitable factors in determining damages.
2. The damages award on remand was improper only insofar as the trial court ordered H to disgorge $50,000 in consulting fees paid pursuant to the consulting contract: contrary to H's claim, the court's finding that H did not perform substantial work before being hired by the plaintiff in 2013 that entitled him to the $150,000 finder's fee was not clearly erroneous, as it was supported by portions of the hearing testimony and the court was free to resolve any inconsistency in the testimony by crediting only the portions that buttressed its findings; moreover, although the record did not support the court's finding that H attempted to offer into evidence at the hearing in damages numerous exhibits that the plaintiff's counsel had not seen previously, that unsupported finding did not undermine appellate confidence in the court's fact-finding process and, accordingly, it was harmless; furthermore, although the court improperly ordered disgorgement of $50,000 of the $150,000 consulting fees, as it was prohibited by this court's previous decision from ordering disgorgement of amounts earned by H outside of H's period of employment with the plaintiff and it assumed that H had earned the consulting fees for services performed after his employment with the plaintiff had ended, the trial court did not otherwise abuse its discretion in awarding damages but, rather, properly balanced the equities and utilized the equitable remedies of forfeiture and disgorgement, as it properly considered the significant value of H's services to the plaintiff as an employee and balanced that against its other factual findings, the court was not precluded from finding that H acted wilfully and engaged in disloyal acts throughout his employment or from relying on such findings to issue the damages award, as they were supported by the record and fit within the guidance set forth in *Wall Systems, Inc.* v. *Pompa* (324 Conn. 718), there was no suggestion in the court's decision that it had used H's discovery violations to supplant the plaintiff's burden to demonstrate damages, and H's assertion that the plaintiff was unjustly enriched by the award was unavailing.

Argued February 2—officially released December 28, 2021

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. A. William Mottolese*, judge trial referee, granted the plaintiff's motion for default against the defendants and for nonsuit on the defendants' counterclaim; thereafter, the court, *Hon. A. William Mottolese*, judge trial referee, granted the plaintiff's motion for judgment on the default and rendered a judgment of nonsuit as to the defendants' counterclaim; subsequently, following a hearing in damages, the court, *Hon. Taggart D. Adams*, judge trial referee, rendered judgment for the plaintiff, and the defendants appealed to this court, *Alvord*, *Keller* and *Flynn*, *Js.*, which reversed the trial court's judgment only with respect to the award of damages against the named defendant and remanded the matter for further proceedings; thereafter, following a hearing in damages, the court, *Hon. Kenneth B. Povodator*, judge trial referee, rendered judgment for the plaintiff, from which the named defendant appealed to this court. *Reversed in part*; *judgment directed.*

James G. Henderson, self-represented, the appellant (named defendant).

Gary S. Klein, with whom was *Liam S. Burke*, for the appellee (plaintiff).

Opinion

MOLL, J. This matter returns to us following our decision in *Hospital Media Network, LLC* v. *Henderson*, 187 Conn. App. 40, 201 A.3d 1059 (2019) (*HMN*), in which this court reversed the judgment of the trial court rendered in favor of the plaintiff, Hospital Media Network, LLC, and against the self-represented defendant

James G. Henderson[1] only as to the award of damages and remanded the case for a new hearing in damages. Id., 60. The defendant now appeals from the judgment rendered on remand awarding damages to the plaintiff. On appeal, the defendant claims that the trial court (1) exceeded the scope of this court's remand order in *HMN* and (2) awarded damages that were (a) predicated on factual findings that were not supported by the record and (b) inequitable.[2] We reverse, in part, the judgment of the trial court.

This court's opinion in *HMN* sets forth the following relevant procedural background, which, although lengthy, we recite to place the defendant's claims on appeal in their proper context. "In November, 2013, the plaintiff commenced this action alleging that the defendant, its former employee, violated the Connecticut Uniform Trade Secrets Act (CUTSA), General Statutes § 35-50 et seq., committed tortious interference with the plaintiff's business and contractual relations, breached the duty of employee loyalty, breached his fiduciary duty, and usurped corporate opportunities of the plaintiff. The defendant was defaulted, and the trial court [*Hon. Taggart D. Adams*, judge trial referee] held a hearing in damages. After the hearing, the court awarded the plaintiff damages solely on its claim of breach of fiduciary duty,[3] the essential elements of

[1] The plaintiff's complaint also named Taylor Henderson as a defendant. A judgment was rendered against Taylor Henderson, upon default as to liability, in the amount of $2000, which was not challenged on appeal in *HMN* and which has been fully satisfied. See *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 42 n.1. For the sake of simplicity, we refer in this opinion to James G. Henderson as the defendant.

[2] For ease of reference, we address the defendant's claims in a different order than they are presented in his principal appellate brief.

[3] "Although the plaintiff alleged breach of the duty of employee loyalty separate from its claim of breach of fiduciary duty, it specified in its breach of fiduciary duty count that one such fiduciary duty breached was the duty of loyalty. In its memorandum of decision [awarding the damages at issue in the prior appeal], the court awarded damages for 'breach of fiduciary duty owed to the corporation' and cited case law and secondary sources

which were admitted by virtue of the defendant's default.

"With respect to its breach of fiduciary duty count, the plaintiff alleged that it employed the defendant as its chief revenue officer and paid him substantial compensation from January 1 to September 2013. On September 5, 2013, the plaintiff terminated the defendant's employment 'for cause for several reasons including, without limitation [the defendant's] actively working for various companies unrelated to [the plaintiff] for his own benefit and without [the plaintiff's] permission or knowledge during regular business hours.' Specifically, it alleged that the defendant worked for or on behalf of Generation Partners (Generation), a private equity investment firm, 'to raise capital for other digital media companies including but not limited to' Captivate Network Holdings, Inc. (Captivate), and used the plaintiff's computers and infrastructure to conduct business for those other digital media companies without the plaintiff's permission or knowledge. The plaintiff claimed that the defendant played golf on a social basis and otherwise took time off during regular business hours without the plaintiff's permission.

"The plaintiff further alleged that the parties had a fiduciary relationship 'by virtue of the trust and confidence' the plaintiff placed in the defendant as its chief revenue officer, a senior executive position. Among the duties allegedly owed to the plaintiff were the duty of loyalty, the duty to act in good faith, and the duty to act in the best interest of the plaintiff. The plaintiff asserted that the defendant breached these duties in advancing his own interests to the detriment of the plaintiff. Lastly, the plaintiff alleged that the defendant's

addressing the fiduciary duty of loyalty. Our Supreme Court likewise has treated the duty of loyalty as a fiduciary duty in the employment context. See *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 733, 154 A.3d 989 (2017)." *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 42–43 n.2.

breach caused it to sustain damages. The plaintiff sought, inter alia, compensatory and punitive damages.

"The defendant answered and filed an amended counterclaim, alleging breach of contract, wrongful termination, misrepresentation and deceit, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The defendant requested, inter alia, compensatory and punitive damages.

"The parties engaged in discovery disputes, resulting in an April, 2016 order from the court [*Hon. A. William Mottolese*, judge trial referee] that the parties 'confer face-to-face in an effort to resolve these discovery disputes, bearing in mind that reasonable good faith efforts at compromise are essential to every discovery dispute.' On June 27, 2016, after finding the defendant's objections to the plaintiff's discovery requests 'intentionally evasive and intended to obstruct the process,' the court ordered full compliance within thirty days. On July 28, 2016, the plaintiff filed a motion for default and nonsuit on the basis that the defendant had failed to comply with the court's June 27 order. The court granted the motion, finding that the '[p]laintiff is clearly prejudiced by these obstructive tactics and the only appropriate remedy proportionate to the infraction is default.' On September 26, 2016, the court rendered judgment for the plaintiff on its affirmative claims and against the defendant on his counterclaim.

"On September 27, 2016, the court [*Hon. Taggart D. Adams*, judge trial referee] held a hearing in damages. The plaintiff presented the testimony of Andrew Hertzmark, an employee of Generation; Christopher Culver, chief executive officer of the plaintiff; Taylor Henderson; and [the defendant]. At the conclusion of the hearing, the court requested posttrial briefing, which the parties submitted on October 18, 2016.

"On February 15, 2017, the court issued a memorandum of decision [2017 decision]. In its memorandum, the court reviewed the evidence presented during the [September 27, 2016] hearing in damages. From 2011 to 2013, the defendant was a consultant to the plaintiff, and the plaintiff compensated the defendant by making payments to his consulting company, St. Ives Development Group. On January 1, 2013, the defendant became a full-time employee and chief revenue officer of the plaintiff. The plaintiff paid him a salary of over $12,000 per month, totaling $121,579.84 in 2013, and also paid him a sales target bonus of $25,000 in May, 2013. That bonus was paid to St. Ives Development Group. Just weeks after becoming a full-time employee of the plaintiff, the defendant communicated with Hertzmark, identifying the plaintiff as a possible investment target for his fund, and included the plaintiff's revenues and possible buyout price.

"In 2013, Hertzmark was working on a potential transaction in which Generation would acquire Captivate from Gannett Company, Inc. (Gannett). Both Captivate and the plaintiff are involved in the same business sector. While Captivate sells advertising space on digital monitors in elevators, the plaintiff sells advertising space on monitors located in hospitals and medical offices. Hertzmark testified that the defendant assisted with the Captivate acquisition, giving a presentation with Hertzmark to Gannett and helping formulate the letter of intent memorializing Generation's proposed purchase of Captivate. In March, 2013, Hertzmark e-mailed the defendant stating that Generation's letter of intent was not shared with the head of Captivate and, therefore, Gannett was surprised to learn that the head of Captivate was aware of plans to install the defendant as the new chief executive officer of Captivate once that business was acquired by Generation. In March and April, 2013, the defendant corresponded

with Hertzmark regarding Captivate's attributes as an investment and reviewed due diligence information provided by Captivate from February through April, 2013. He told Hertzmark on July 6, 2013, that he wanted his attorney to review his Captivate employment contract once completed.

"The plaintiff terminated the defendant's employment on September 5, 2013, and Generation's acquisition of Captivate from Gannett closed on September 26, 2013. Upon the transaction's closing, the defendant was paid a finder's fee of $150,000, awarded a consulting contract with Captivate for three years at $50,000 annually, and given the opportunity to purchase restricted stock of Captivate.

"The court found that 'during the events in this case [the defendant] either never comprehended or ignored the different consequences of being a company employee and being a consultant,' referring to the defendant's testimony in which he described himself as a 'consultant employee' of the plaintiff. The court referenced the testimony of Culver, the plaintiff's chief executive officer, that the plaintiff's sales increased from $1.9 million in 2010 to $6.6 million in 2013. The court additionally noted Culver's testimony that the plaintiff 'held itself out to be the fastest growing company of its kind during this period' and his recognition that the defendant was part of this 'terrific growth.' Crediting Culver's testimony, the court found that 'there was a sharp increase in the [plaintiff's] sales' while the defendant worked for the plaintiff.

"Turning to the plaintiff's claimed damages, the court first found that the plaintiff was not entitled to the defendant's 'compensation from Captivate' on the theory that the defendant usurped a corporate opportunity. Specifically, the court found that the opportunity the defendant took was 'employment' at Captivate, which

was not an opportunity available to the plaintiff. The court determined, however, that damages were appropriate on the plaintiff's claim of the breach of fiduciary duty of loyalty, and measured the damages 'by the gain to the faithless employee.' The court awarded damages against the defendant in the total amount of $454,579.76, including $146,579.84, representing the defendant's 2013 salary ($121,579.84) and bonus ($25,000); $150,000, representing the finder's fee paid by Generation or Captivate [($150,000 finder's fee)]; $150,000, representing the consulting fees to be paid by Captivate from 2013 through 2016 [($150,000 consulting fees)]; and $7999.92, representing the value of the Captivate stock at the time of purchase.

"The court declined to award attorney's fees under CUTSA, finding that 'there was minimal or no misappropriation of trade secrets in this case, and no justifiable basis for awarding fees under that statute.' The court further declined to award attorney's fees as punitive damages under the common law, on the basis that the defendant 'has been penalized severely already by this court's decision. To add hundreds of thousands of dollars more, would not only be punitive, it would be overkill.' It additionally found that although the defendant's actions were 'uninformed, and even stupid,' his conduct did not meet the common-law standard for awarding attorney's fees, which, the court observed, requires that the conduct be 'outrageous, done with a bad motive, or with reckless indifference.' " (Footnote in original; footnotes omitted.) Id., 42–48. The court noted one exception to its determination that the defendant's conduct and behavior did not merit awarding common-law attorney's fees, which involved the defendant's "conscious and continuing obstruction of the ordinary discovery process in civil cases." The court underscored prior comments made by Judge Mottolese, including

that the defendant's objections to the plaintiff's discovery requests were " 'without merit' . . . 'intentionally evasive and intended to obstruct the process,' " and that the defendant's conduct " 'demonstrate[d] hardened intransigence . . . .' " Observing that Judge Mottolese had indicated that the plaintiff could seek attorney's fees and costs if the defendant failed to comply with the plaintiff's discovery requests, the court awarded the plaintiff $21,922.50 in attorney's fees, which "represent[ed] the time the plaintiff's counsel spent addressing the parties' discovery disputes."[4] *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 48 n.11.

The defendant appealed from the judgment in the 2017 decision, claiming that the damages award was improper because the plaintiff had failed to offer proof of its damages.[5] Id., 48. On January 8, 2019, this court issued its opinion in *HMN*, reversing the judgment rendered against the defendant in the 2017 decision only as to damages. Id., 40, 60. In addressing the defendant's claim, this court first observed that, "[b]ecause of the default entered against the defendant, he [was] precluded from challenging his liability to the plaintiff under the claims pleaded"; id., 49; however, the defendant was "entitled . . . to challenge the determination of monetary relief awarded by the court." Id., 50. After providing an overview of our Supreme Court's decision in *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 154 A.3d 989 (2017), which was published after the 2017 decision

[4] The defendant did not appeal from the attorney's fees award in *HMN*. See *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 48 n.11. In his principal appellate brief, the defendant represents that the attorney's fees award has been satisfied.

[5] "[T]he plaintiff [did] not cross [appeal] from the [trial] court's refusal to award damages on the claims alleging a violation of CUTSA, tortious interference with the plaintiff's business and contractual relations, breach of the duty of employee loyalty, and usurpation of corporate opportunities." *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 44 n.3.

and which "provided guidance on the equitable remedies available to an employer upon proving that an employee has breached his fiduciary duty of loyalty"; *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 51; this court concluded "that the award of monetary relief [in the 2017 decision] was disproportionate to the misconduct at issue and failed to take into account the equities of the case at hand." Id., 54.

Turning first to the portion of the damages award requiring the defendant to forfeit his 2013 salary plus his sales bonus, totaling $146,579.84, this court stated that the trial court made factual findings that corresponded with the non-exhaustive list of factors delineated in *Wall Systems, Inc.*,[6] but that the court "ultimately failed to give proper weight to these findings in fashioning its damages award." Id., 56. This court noted that "the trial court expressly recognized the value of the services the defendant provided the plaintiff, finding 'a sharp increase in the [plaintiff's] sales' while the defendant worked for the plaintiff, and concluding that the defendant was part of this 'terrific growth.' That finding corresponds with the *Wall Systems, Inc.* factor prompting consideration of 'the effect of the disloyal acts on the value of the employee's properly performed services to the employer.' The court's finding, in essence

[6] The factors enumerated in *Wall Systems, Inc.*, which our Supreme Court "gleaned from existing jurisprudence" and which were "not intended to be exhaustive"; *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 737; are as follows: "[T]he employee's position, duties and degree of responsibility with the employer; the level of compensation that the employee receives from the employer; the frequency, timing and egregiousness of the employee's disloyal acts; the wilfulness of the disloyal acts; the extent or degree of the employer's knowledge of the employee's disloyal acts; the effect of the disloyal acts on the value of the employee's properly performed services to the employer; the potential for harm, or actual harm, to the employer's business as a result of the disloyal acts; the degree of planning taken by the employee to undermine the employer; and the adequacy of other available remedies . . . ." Id.

a recognition that the defendant was providing extraordinary value to the plaintiff despite his breach of fiduciary duty, should have weighed in favor of a measured forfeiture, not the defendant's full salary and bonus." Id.

Next, this court stated that "the [trial] court also made a finding related to the wilfulness of the defendant's actions, another of the *Wall Systems*, *Inc.* factors. The court characterized the defendant's actions as 'uninformed, and even stupid.' By declining to award attorney's fees as punitive damages under the common law on this basis, it is evident that the court rejected any notion that the defendant's conduct was 'outrageous, done with a bad motive, or with reckless indifference.' The court also found that the defendant had 'either never comprehended or ignored the different consequences of being a company employee and being a consultant,' referring to the defendant's testimony in which he described himself as a 'consultant employee' of the plaintiff. Despite recognizing that the defendant potentially 'never comprehended' the distinction between serving as an employee and a consultant and finding that the defendant's behavior was 'uninformed' rather than done with a bad motive, the court failed to give proper weight to these findings when fashioning its award." Id., 57–58. This court continued: "[T]he trial court's express factual findings reflect an uninformed employee who continued to provide significant value to his employer despite his breach of fiduciary duty. These findings, clearly not in the nature of corrupt or reprehensible behavior, should have weighed in favor of an award of something less than full forfeiture." Id., 58.

This court then noted, in reference to another *Wall Systems*, *Inc.* factor, that "forfeiture was not the sole remedy available to the [trial] court, as the court had before it evidence of the benefit the defendant received from third parties Generation and Captivate. . . . The

court found those benefits . . . to amount to a total of $307,99[9].92, and ordered disgorgement in full." (Citation omitted.) Id.

Turning to the portion of the damages award requiring the defendant to disgorge $307,999.92, which comprised the $150,000 finder's fee, the $150,000 consulting fees, and the $7999.92 value of the Captivate stock purchased by the defendant, this court determined that the disgorgement sum "appear[ed] to reflect compensation that the defendant had earned for consulting that he performed both prior to and subsequent to his nine month period of full-time employment with the plaintiff." Id., 58–59. This court stated that, "[t]o the extent the defendant rendered some of the services for which he was compensated by third parties both prior and subsequent to his full-time employment with the plaintiff, some commensurate portion of the compensation received in exchange for those services cannot be said to have been gained by the defendant's breach and should not have been included in the court's order of disgorgement." Id., 59.

In sum, this court concluded that, "[i]n fashioning its damage award [in the 2017 decision], the [trial] court failed to formulate a remedy appropriate to the particular circumstances of this case, in light of its own factual findings which weighed in favor of a measured award. Ultimately, the award of wholesale forfeiture and disgorgement in full failed to take into account the equities of the case at hand and did not achieve a just result." Id., 60. Accordingly, this court reversed the judgment rendered against the defendant in the 2017 decision only as to the damages award and remanded the case for a new hearing in damages. Id.

Following this court's remand in *HMN*, the trial court, *Hon. Kenneth B. Povodator*, judge trial referee, held a new hearing in damages on September 10, 2019. At the

outset of the hearing and without objection, the court indicated that it would consider the exhibits admitted during the September 27, 2016 hearing in damages as part of the record before it. In addition, without objection, the court admitted as a full exhibit a certified copy of the transcript of the September 27, 2016 hearing in damages. Culver, Taylor Henderson, and the defendant testified at the September 10, 2019 hearing in damages, and additional exhibits were admitted. On October 31, 2019, the parties filed posttrial briefs.

On February 25, 2020, the court issued a memorandum of decision rendering judgment in favor of the plaintiff in the amount of $323,545.84—$131,033.92 less than the damages awarded in the 2017 decision. This award represented (1) the defendant's forfeiture of (a) his 2013 salary in the amount of $121,579.84 and (b) $1966 in certain consulting fees paid by the plaintiff, and (2) the defendant's disgorgement of (a) the $150,000 finder's fee and (b) $50,000, constituting one year's worth of the $150,000 consulting fees.[7] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

We first address the defendant's claim that the trial court exceeded the scope of this court's remand order in *HMN*. Specifically, the defendant asserts that, on remand, the court was bound by the factual findings made in the 2017 decision that were not challenged by the plaintiff in *HMN* by way of a cross appeal, such

[7] Relative to the $454,579.76 in damages awarded in the 2017 decision, the defendant retained on remand his $25,000 sales bonus and $100,000 of the $150,000 consulting fees; however, the court on remand ordered forfeiture of $1966 in the consulting fees paid by the plaintiff, which were not included in the damages award in the 2017 decision. Additionally, on remand, the plaintiff did not seek disgorgement of the $7999.92 in Captivate stock that the defendant had purchased, which had been ordered disgorged in the 2017 decision.

that the court committed error by "reopening and substantially revising" several of the factual findings set forth in the 2017 decision. Relatedly, the defendant contends that the court thus improperly "reweighed [equitable] factors that should have been locked into place." We disagree.

"We begin our analysis with the applicable standard of review. Determining the scope of a remand is a matter of law because it requires the trial court to undertake a legal interpretation of the higher court's mandate in light of that court's analysis. . . . Because a mandate defines the trial court's authority to proceed with the case on remand, determining the scope of a remand is akin to determining subject matter jurisdiction. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . .

"At the outset, we note that, [i]f a judgment is set aside on appeal, its effect is destroyed and the parties are in the same condition as before it was rendered. . . . As a result, [w]ell established principles govern further proceedings after a remand by this court. In carrying out a mandate of this court, the trial court is limited to the specific direction of the mandate as interpreted in light of the opinion. . . . This is the guiding principle that the trial court must observe. . . . It is the duty of the trial court on remand to comply strictly with the mandate of the appellate court according to its true intent and meaning. . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein. . . .

"Compliance [with a mandate] means that the direction is not deviated from. The trial court cannot adjudicate rights and duties not within the scope of the remand. . . . No judgment other than that directed or

permitted by the reviewing court may be rendered . . . . The trial court should examine the mandate and the opinion of the reviewing court and proceed in conformity with the views expressed therein." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 383–84, 3 A.3d 892 (2010).

Mindful of these principles, we turn to this court's opinion and remand order in *HMN*. As we detailed previously in this opinion, this court in *HMN* concluded that the damages award in the 2017 decision was improper because the trial court failed to weigh properly the equities in light of its factual findings. *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 60. This court's remand order provided in relevant part that "[t]he judgment is reversed only as to the award of damages against [the defendant] and the case is remanded for a new hearing in damages . . . ." Id. On remand, the trial court conducted a new hearing in damages, hearing testimony from Culver, Taylor Henderson, and the defendant and admitting additional exhibits offered by the parties that supplemented the evidence adduced during the prior hearing in damages. Whereupon the court issued a decision in which it set forth findings of fact and, guided by the principles detailed in *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 718, awarded damages on the basis of its consideration of the equities in the case. See part II of this opinion.

We conclude that the trial court acted within the scope of this court's remand order in *HMN* by making its own, independent factual findings on the basis of the entire record before it and relying on those findings to assess the equities in the case. This court in *HMN* did not issue a circumscribed remand order that bound Judge Povodator to Judge Adams' factual findings in the 2017 decision; rather, it reversed the 2017 decision

as to the damages awarded against the defendant and remanded the case for a new hearing in damages. *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 60. Nothing in *HMN* indicated that the hearing in damages on remand was to be limited in nature. Insofar as the 2017 decision awarded damages against the defendant, "its effect [was] destroyed and the parties [were] in the same condition as before it was rendered." (Internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, supra, 298 Conn. 383. In other words, following *HMN*, there were no factual findings from the 2017 decision that bound the trial court on remand in its determination of damages. Cf. *Fazio* v. *Fazio*, 199 Conn. App. 282, 287, 289–90, 235 A.3d 687 (trial court bound on remand by prior finding of cohabitation when that finding was not challenged in prior appeal and this court in prior appeal, rather than remanding for new trial, issued "limited remand" directing trial court " 'to determine the intent of the parties after consideration of all the available extrinsic evidence and the circumstances surrounding the entering of the [separation] agreement' "), cert. denied, 335 Conn. 963, 239 A.3d 1213 (2020). Moreover, given that the record on remand included additional evidence, it follows that the court necessarily made its own findings on the basis of the totality of the evidence in the record and, in light of those findings, considered the relevant equitable factors in determining damages.[8] Accordingly, the defendant's claim fails.

[8] We recognize that, "[i]n Connecticut, we follow the [well recognized] principle of law that the opinion of an appellate court, so far as it is applicable, establishes the law of the case upon a retrial, and is equally obligatory upon the parties to the action and upon the trial court. . . . The rule is that a determination once made will be treated as correct throughout all subsequent stages of the proceeding except when the question comes before a higher court . . . and applies . . . to remands for new trial . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Behrns* v. *Behrns*, 124 Conn. App. 794, 815, 6 A.3d 184 (2010). We also recognize that "[i]t is the function of the trial court, not [an appellate] court, to find facts. . . . Imposing a fact-finding function on this court, therefore, would

II

The defendant next claims that the damages award on remand was improper because the trial court (1) made factual findings that were unsupported by the record and (2) improperly weighed the equities in the case. For the reasons that follow, we agree with the defendant that the court committed error, only insofar as the court ordered him to disgorge $50,000 of the $150,000 consulting fees.

We begin by setting forth the following applicable legal principles and standard of review. As our Supreme Court explained in *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 718, "[i]f an employer can prove an employee's breach of his or her duty of loyalty, there are a variety of remedies potentially available." Id., 732. These include the equitable remedies of forfeiture and disgorgement. Id., 729. As to disgorgement, "if an employee realizes a material benefit from a third party in connection with his breach of the duty of loyalty, the employee is subject to liability to deliver the benefit, its proceeds, or its value to the [employer]. . . . Accordingly, [a]n employee who breaches the fiduciary duty of loyalty may be required to disgorge any profit or benefit he received as a result of his disloyal activities, regardless of whether the employer has suffered a corresponding loss." (Citations omitted; internal quotation marks omitted.) Id., 733.

"Additionally, an employer may seek forfeiture of its employee's compensation. . . . [Forfeiture] is derived

be contrary to generally established law. Indeed, it would be inconsistent with the entire process of trial fact-finding for an appellate court to do so." (Citation omitted; internal quotation marks omitted.) *Miller* v. *Westport*, 268 Conn. 207, 221, 842 A.2d 558 (2004). Thus, on remand, the trial court was bound by this court's determination in *HMN* that the damages award in the 2017 decision constituted an abuse of discretion, in addition to any legal precepts set forth in *HMN*; however, this court did not direct the trial court to make any particular factual findings or otherwise restrain the trial court's fact-finding ability on remand.

from a principle of contract law: if the employee breaches the duty of loyalty at the heart of the employment relationship, he or she may be compelled to [forgo] the compensation earned during the period of disloyalty. The remedy is substantially rooted in the notion that compensation during a period in which the employee is disloyal is, in effect, unearned. . . . Forfeiture may be the only available remedy when it is difficult to prove that harm to [the employer] resulted from the [employee's] breach or when the [employee] realizes no profit from the breach. In many cases, forfeiture enables a remedy to be determined at a much lower cost to litigants. Forfeiture may also have a valuable deterrent effect because its availability signals [employees] that some adverse consequence will follow a breach of fiduciary duty. . . . Notably, however, even in cases in which a court orders forfeiture of compensation, the forfeiture normally is apportioned, that is, it is limited to the period of time during which the employee engaged in disloyal activity." (Citations omitted; internal quotation marks omitted.) Id., 733–34. "[W]hen imposing the remedy of forfeiture of compensation, depending on the circumstances, a trial court may in its discretion apply apportionment principles, rather than ordering a wholesale forfeiture that may be disproportionate to the misconduct at issue. . . . Conversely, the court may conclude that all compensation should be forfeited because the employee's unusually egregious or reprehensible conduct pervaded and corrupted the entire [employment] relationship." (Citation omitted; internal quotation marks omitted.) Id., 738; see also id., 734 n.11 ("[I]f an employee's disloyalty is confined to particular pay periods, so is the required forfeiture of compensation. . . . Conversely, if the compensation received by a disloyal employee is not apportioned to particular time periods or items of work, and his or her breach of the duty of loyalty is wilful and deliberate,

forfeiture of his or her entire compensation may result." (Citations omitted; emphasis omitted.)).

Our Supreme Court emphasized that the remedies of forfeiture and disgorgement "are not mandatory upon the finding of a breach of the duty of loyalty, intentional or otherwise, but rather, are discretionary ones whose imposition is dependent upon the equities of the case at hand." Id., 729. "Generally speaking, equitable determinations that depend on the balancing of many factors are committed to the sound discretion of the trial court. . . . [C]ourts exercising their equitable powers are charged with formulating fair and practical remedies appropriate to the specific dispute. . . . In doing equity, [a] court has the power to adapt equitable remedies to the particular circumstances of each particular case. . . . [E]quitable discretion is not governed by fixed principles and definite rules . . . . Rather, implicit therein is conscientious judgment directed by law and reason and looking to a just result." (Citations omitted; internal quotation marks omitted.) Id., 736.

In determining whether to invoke the remedies of forfeiture or disgorgement, "a trial court should consider all of the facts and circumstances of the case before it," including various factors enumerated by our Supreme Court insofar as they apply. Id., 737; see also footnote 6 of this opinion. "The several factors embrace broad considerations which must be weighed together and not mechanically applied. . . . [T]he judicial task is to search for a fair and reasonable solution in light of the relevant considerations . . . and to avoid unjust enrichment to either party." (Citations omitted; internal quotation marks omitted.) *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 738.

"As a general matter, [t]he trial court has broad discretion in determining whether damages are appropriate. . . . Its decision will not be disturbed on appeal

absent a clear abuse of discretion. . . . Our review of the amounts of monetary awards rendered pursuant to various equitable doctrines is similarly deferential." (Internal quotation marks omitted.) *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 51. "Although the determination of whether equitable doctrines are applicable in a particular case is a question of law subject to plenary review . . . the amount of damages awarded under such doctrines is a question for the trier of fact." (Citation omitted.) Id., 51 n.13. "With regard to the trial court's factual findings . . . the clearly erroneous standard of review is appropriate. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Internal quotation marks omitted.) *Howard-Arnold, Inc.* v. *T.N.T. Realty, Inc.*, 145 Conn. App. 696, 717, 77 A.3d 165 (2013), aff'd, 315 Conn. 596, 109 A.3d 473 (2015).

In its decision on remand, the court found the following relevant facts and set forth the following reasoning in support of the damages award. The court observed that, with regard to the remand order in *HMN*, "[i]n stating that the goal should have been 'a measured award' and that the 'wholesale forfeiture and disgorgement in full' were improper, [this court], seemingly unambiguously, was sending a message that adjustments [to the damages awarded in the 2017 decision] were required . . . ." The court construed this court's "mandate [to be] to moderate the amount awarded using equitable principles" and further commented that this court had "directed [the trial court on remand] to award a more measured level of damages, taking into account work performed by the defendant prior to his employment by the plaintiff and work performed by the defendant after termination of his

employment and the work performed for the plaintiff." The court further noted that the record before it included the transcript of the September 27, 2016 hearing in damages, as well as the exhibits admitted at that hearing, as supplemented by the testimony and exhibits admitted during the September 10, 2019 hearing in damages.

At the outset of its analysis, the court stated that, during the September 10, 2019 hearing in damages, "[t]he defendant attempted to offer a large number of documents most of which counsel for the plaintiff claimed never to have seen before . . . . When the defendant proffered many of his exhibits during the . . . hearing, counsel for the plaintiff repeatedly stated that he had not seen the documents previously—the defendant did not challenge such characterizations, implicitly acknowledging that notwithstanding claims that the plaintiff already had access to all relevant documents because they were in the possession of the plaintiff, there were numerous documents that were not and would not have been in the plaintiff's possession. Indeed, after an early e-mail sent [by] the defendant [from] his e-mail address as an employee of the plaintiff, he asked [Hertzmark] to send all further e-mails to the defendant's personal e-mail address . . . indicating the conscious effort of the defendant to minimize usage of the plaintiff's e-mail system [(January 25, 2013 e-mail)]."[9] (Citations omitted.) The court further stated that this conduct by the defendant was "against a backdrop of the defendant having been defaulted for failing to comply with discovery obligations, such conduct eliciting characterizations of the defendant's behavior as 'hardened intransigence' and 'obstructive tactics' . . . ." (Citation omitted.) As the court explained, "[t]he point of this discussion is that the combination of the explicit comments of Judge Mottolese in earlier

[9] The January 25, 2013 e-mail was admitted as a full exhibit.

decisions on motions, leading to the entry of a default against the defendant (and a nonsuit as to [his counterclaim]), coupled with further indications of the existence of available potentially relevant materials not provided to the plaintiff prior to this latest hearing, indicate efforts to subvert the truth finding aspects of these proceedings while then claiming that the plaintiff has not produced sufficient evidence to warrant an award of damages."

Later in its decision, in applying the principles set forth in *Wall Systems, Inc.*, the court "identif[ied] a factor relatively unique to this case." The court explained: "In granting a default as to the plaintiff's claims and a nonsuit against the defendant on his [counterclaim], the court [*Hon. A. William Mottolese*, judge trial referee] characterized the defendant's approach to discovery as reflecting 'hardened intransigence' . . . . Later in that same order, the court concluded that 'the plaintiff is clearly prejudiced by these obstructive tactics and the only appropriate remedy proportionate to the infraction is default.' This was after the court had characterized the defendant's objections to discovery requests in less than flattering terms: '[T]he objections are deemed intentionally evasive and intended to obstruct the process,' followed by what amounted to an invitation to the plaintiff to file an application for attorney's fees . . . .

"The extent to which the defendant was affirmatively disloyal or engaged in self-dealing, the extent to which he took and misused proprietary or confidential information, the extent to which he may have usurped corporate opportunities (or assisted other entities in usurping corporate opportunities), the extent to which he may have interfered with the plaintiff's business expectancies, all would require access to materials in the possession or control of the defendant. . . . Notwithstanding the defendant's nonproduction of [certain] documents

[offered by the plaintiff during the September 27, 2016 hearing in damages], the plaintiff was able to obtain them at least in part due to fortuitous circumstances. . . . [T]here was at least one e-mail within his business account [the January 25, 2013 e-mail] both reflecting other ventures [the defendant was engaged in] and efforts made to conceal that type of activity. Further, the use of a personal e-mail account from the plaintiff's computers prevented the plaintiff from being able to view e-mails themselves, but attachments such as PDF documents, apparently by virtue of their status as attachments, were copied or otherwise preserved on the plaintiff's servers, and therefore could be viewed by the plaintiff. Therefore, the plaintiff had a very limited source of information directly available to it as to the defendant's activities but was able to obtain somewhat more complete information from Generation as to its interactions with the defendant, before, during and after his employment by the plaintiff. . . .

"The plaintiff, then, fortuitously had 'leads' relating to the defendant's continued interaction with Generation and especially the Captivate deal. Absent other such leads, however, the plaintiff would have no way of knowing the extent to which the defendant had used/misused his position or information available to him due to his position in manners detrimental to the plaintiff and/or benefiting the defendant. This is especially significant since the defendant has claimed that despite his having been hired as an employee of the plaintiff, he thought he was an employee-consultant and able to engage in other business ventures despite employment by the plaintiff.

"The court recognizes that the defendant already has been sanctioned for his failure to comply with disclosure obligations by virtue of the entry of a default and nonsuit. There remains, however, an asymmetry with

respect to knowledge/information pertaining to damages. All of the information provided by the plaintiff with respect to its damages claims was known/knowable to the defendant—there were no surprises or potential claims of withholding of information by the plaintiff. The plaintiff, however, was only able to get limited meaningful disclosure through third parties and/or its own efforts—other activities that might have led to claims of wrongdoing with associated further disgorgement, information solely controlled by the defendant, remained unknown to the plaintiff. In effect, the defendant has limited the information available to the plaintiff concerning his wrongdoing, while able to cherry-pick information to be disclosed at trial that he deemed might be helpful. . . .

"This court, then, is concerned about the implications of allowing a defendant to restrict access to detrimental evidence relating to the extent of his wrongdoing and the extent of damages, while allowing him to ask for favorable equitable treatment based on favorable information he is able to proffer (here, the extent of sales he claims to have made). The court must decide this case, but cannot ignore potential implications of allowing an adverse party to have the ability to stymie the court's ability to make a meaningful and reasonably accurate determination of the damages which a party is entitled to recover." (Citations omitted.)

In light of this court's analysis in *HMN*, the trial court also addressed three specific topics: (1) the services that the defendant had provided to the plaintiff during his period of employment; (2) the defendant's efforts, prior to his employment with the plaintiff, to assist Generation in its acquisition of Captivate; and (3) the work performed by the defendant for Captivate after the plaintiff had terminated his employment. As to the services provided by the defendant as the plaintiff's

employee, the court found that, although it was undisputed that the plaintiff's sales increased "substantially" while the defendant was employed by the plaintiff, "as [Culver] testified, it is unknown how much more growth there would have been had the [defendant] been devoting 100 percent of his time—as an employee should—to his employer's business rather than devoting unknown amounts of time to personal ventures. This is in the context of a business that was rapidly growing, and continued to grow even after the departure/termination of the [defendant]. Because of the clandestine manner in which the defendant operated, the plaintiff could not know whether the defendant had been engaged in projects other than (in addition to) the Captivate project that resulted in the $300,000 . . . that had been ordered [to be disgorged in the 2017 decision]." The court further stated that this court in *HMN* "took note of the fact . . . that the defendant had generated something in the area of $4 million in sales. Sales, of course, do not equate to profits. More importantly, it appears that the defendant hit his sales target for a [$25,000] bonus in the first few months of employment (by April [2013])—given the overall annual sales of the [plaintiff] for the full year (under $7 million . . .), there was nothing like that performance over the balance of his employment, suggesting something in the nature of diminishing performance (slacking off or being diverted by other activities?). Others in the company, and notably [Taylor Henderson] who no longer is in the case, also were involved in sales, which would have contributed to overall sales for the year. This is in a business that was experiencing growth in sales before the defendant's involvement and after his termination. . . . There is no doubt that [the defendant] provided services of value to the plaintiff during the time he was an employee, but there are questions as to whether the plaintiff was getting what it was paying for over the course of employment (especially after the first few months) and whether

there was a betrayal of loyalties." (Citations omitted; footnote omitted.) The court further found that "[a] permissible inference confirming some level of slacking off can be drawn from the fact that [the defendant] hit his sales bonus target by April [2013] but the overall sales for the year for the [plaintiff] do not reflect that same kind of sales performance for the remaining four [to] five months that [his] employment continued."

Addressing the defendant's level of involvement in the Captivate deal before his employment with the plaintiff, the court found that, "[p]rior to employment by the plaintiff, the defendant's role with respect to Captivate and Generation was as a finder. There was evidence that there had been prior unsuccessful attempts at bringing those two entities together, as well as efforts by the defendant to bring other investment opportunities to the attention of Generation.

"As the court understands it, as a finder, the defendant was acting in a capacity analogous to that of a real estate broker—no compensation is earned with respect to unsuccessful prospects, no matter how much effort is expended. Only when a deal is brought to fruition—in the case of a real estate sale, typically it is obtaining a ready, willing and able buyer as memorialized in a signed contract (rather than the actual closing)—is a commission or finder's fee 'earned.' Thus, while the final dotting of i's and crossing of t's may not be necessary to earn compensation as a finder, a near final if not final deal in terms of obligations is required before any money is earned; unsuccessful efforts, no matter how extensive, do not result in any compensation.

"From this perspective, the court concludes that there was no evidence much less credible evidence that the defendant had rendered consulting services to Generation or Captivate, prior to 2013, for which he

was entitled to compensation. There was no evidence or suggestion that any compensation was due or payable to the defendant relating to Captivate (or other equity investment opportunities for Generation), absent an actual agreement. Specifically relating to the Captivate deal, there may have been some initial/preliminary work in late December, 2012, but the real work of putting together the framework for a deal appears to have taken place over the course of the first six months or so of 2013, as reflected by the limited documentation available to the plaintiff (despite the defendant's discovery noncooperation), and the testimony of . . . Hertzmark. While a very tentative deal may have been reached earlier, the earliest document presented to the court suggesting a near final deal was [defendant's] exhibit I, dated June, 2013."[10] (Footnotes omitted.)

The court further found that the defendant spent time working on the Captivate deal in February through April, 2013. Specifically, the court found that (1) in March and April, 2013, the defendant responded to certain questions posed by Hertzmark concerning Captivate's "attractiveness as an investment," and (2) the defendant reviewed due diligence information from Captivate from February through April, 2013. (Internal quotation marks omitted.) Additionally, the court found that the defendant sent an e-mail to Hertzmark dated July 6, 2013, writing in relevant part: "[W]hen you have my contract completed, I would like to have my attorney review it . . . ." (Internal quotation marks omitted.) The court observed that, at that time, there was official documentation reflecting that the defendant was going to be named the chief executive officer of Captivate. On the basis of "all of the available evidence, the court [could not] conclude that there was any substantial

[10] Exhibit I is an investment memorandum prepared by Generation regarding Captivate.

compensable work performed by the defendant, relating to the Captivate transaction, prior to his becoming employed by the plaintiff; virtually all of the work relating to that deal occurred during his tenure with the plaintiff." Moreover, the court discredited testimony by the defendant "to the effect that most of the work on the Captivate project requiring input from him had been completed prior to his hire date of January 1, 2013."

With respect to the defendant's activity after his employment was terminated by the plaintiff, the court described the evidence as "also sketchy—perhaps sketchier." The court found that "[t]here was evidence that the defendant was to be paid $50,000 a year for three years by Captivate for consulting services, but the court does not recall any evidence that any substantial work actually was performed in that regard. Context, again, is important. There was evidence . . . that the defendant was to become the chief executive officer of Captivate, once the [Captivate] deal was consummated. The defendant did not become [chief executive officer] of Captivate, and he testified that he really had not wanted that position. He acknowledged that he was aware of that designation being a part of the documentation for the deal, that there could be regulatory consequences for erroneous or misleading information, but that he did nothing to correct the claimed misinformation being disseminated. The court does not find this retrospective denial of interest credible.

"Because of that lack of credibility of denial of interest, the court is concerned that the consulting agreement for the postconsummation period might have been something other than a consulting agreement—possibly compensation for him not being designated [chief executive officer], or possibly a part of the finder's fee paid out over time. Again, the court does not recall any substantial much less credible evidence of what the

defendant actually did to earn those posttermination consulting fees.

"The problem is that the court cannot speculate and there is no affirmative evidence of either alternate scenario. Again, this circles back to the fact that the defendant impeded—apparently stonewalled—discovery, making a proof of any contention favorable to the plaintiff difficult if not impossible. This is especially of concern in the first year after severance, particularly to the extent the plaintiff contended that the defendant took and used confidential/proprietary information," which was deemed admitted by virtue of the defendant's default. (Footnote omitted.) Such information "would have been of most value in that first year after termination by the plaintiff. Although the plaintiff could provide no proof of damages, the defendant was defaulted such that liability for all of the claims asserted is deemed admitted, including especially the claimed violation of [CUTSA], as well as other claims that were deemed admitted that potentially implicated use of internal information, e.g., tortious interference with contract."

The court proceeded to consider several of the factors expressly set forth in *Wall Systems, Inc.* Of import, the court found that, with respect to Generation and Captivate, the defendant's disloyal acts "appear[ed] to have been essentially continuous from the start of his employment until termination, with the actual frequency seemingly moderate," and were conducted with "wilfulness in the sense of the conduct being intentional as opposed to inadvertent." The court further found that, although the defendant claimed to believe that his employment with the plaintiff was "in the nature of a consultant on a nonexclusive basis," his directive to Hertzmark to send correspondence to his personal e-mail rather than to his business e-mail "seems to indicate knowledge of impropriety in using the [plaintiff's] e-mail and server for nonemployer business—in turn

suggesting knowledge that the conduct itself was improper." In addition, in analyzing most of the otherwise applicable *Wall Systems*, *Inc.* factors, the court observed that there was "limited reliable information" available to assess the factors "in large measure due to the defendant's noncompliance with discovery."

At the end of its decision, the court determined that "[t]he claims upon which relief has been awarded allow remedies in the nature of disgorgement and forfeiture, and the various factors/considerations set forth in *Wall Systems*, [*Inc.*] point in varying degrees in favor of equitable relief of that nature." The court summarized its reasoning for each component of the $323,545.84 damages award as follows.

In ordering forfeiture of the defendant's 2013 salary and the $1966 in consulting fees paid by the plaintiff, the court stated that it "believes that the defendant's violation of his fiduciary duty to his employer, coupled with the discovery noncompliance precluding the determination of the actual bounds of any improprieties, warrants full forfeiture of his 'regular' pay from the plaintiff.[11] The court has made an exception for the [$25,000 sales] bonus. The bonus was a focused target for sales, and in that narrow respect, the plaintiff got precisely what it had asked for in exchange for the payment of $25,000—the [defendant], relatively quickly, met the required target. While the sales may have been 'low hanging fruit' or consummation of sales to already identified customers, the court believes that that is an

[11] The court's reference to " 'regular' pay" suggests that the court was addressing only the forfeiture of the defendant's 2013 salary, totaling $121,579.84, and making no mention of the $1966 in consulting fees that the court also ordered to be forfeited. Later in its decision, in discussing its forfeiture order, the court stated that it "believes that the compensation received from the plaintiff properly should be forfeited. The one exception is that . . . the $25,000 performance bonus should be allowed . . . ." Thus, we construe the court's reasoning to encompass the forfeiture of both the defendant's 2013 salary and the $1966 in consulting fees paid by the plaintiff.

appropriate adjustment with respect to compensation by the plaintiff." (Footnote added.)

Next, in ordering disgorgement of the $150,000 finder's fee, the court explained: "With respect to Captivate and the Captivate/Generation deal, the court already noted that as a finder, efforts made in prior years that did not lead to a final agreement were not apparently entitled to any compensation, by the very nature of the work. A finder's fee was only earned when a prospective acquisition became an actual acquisition (at least in a binding agreement/commitment sense). Virtually all of the work relating to the eventual Captivate/Generation deal occurred in 2013, with only a sliver of activity having been identified as possibly occurring in late December, 2012." The court continued: "Because of the nature of a finder's fee, the court does not believe that there was any substantial work performed by the defendant, relating to the eventual Captivate/Generation deal, prior to commencement of employment in January, 2013. There is no reason to believe that unsuccessful efforts years earlier have any material bearing on the eventual transaction. Any work that might have been done in late December [2012] would have been relatively preliminary and there was no credible evidence that anything that might have been done in that short (holiday) time frame was substantial. . . . The court finds not credible the protestations of the defendant that his conduct in 2013 relating to the acquisition of Captivate by Generation was minimal and not substantive. Therefore, the court has no hesitation about requiring disgorgement of the full [$150,000] finder's fee."

Finally, in ordering disgorgement of $50,000 of the $150,000 consulting fees, the court explained: "The court already has expressed its reservations as to whether the consulting agreement truly was a consulting agreement as opposed to a form of additional compensation either as a tail for the finder's fee or as

compensation for the defendant not being made the [chief executive officer] of Captivate. Absent evidence in that regard, however, the court cannot act on such concerns. Therefore, consistent with [this court's mandate in *HMN*] for a more measured approach to damages, the court believes that at a minimum, the first year of consulting fees should be forfeited. The very fact that he was awarded a consulting agreement with Captivate was a consequence of the activities undertaken and performed largely if not exclusively during the course of employment by the plaintiff. In other words, even if the defendant actually performed consulting services, the initiation of the relationship was attributable to his conduct while an employee of the plaintiff; at least the first year has a sufficient nexus to the employment by the plaintiff that the first year's consulting fee should be forfeited." The court continued: "But for the fact that the defendant had been instrumental in consummating the Captivate-Generation acquisition deal, it is highly unlikely that he would have obtained a three year consulting agreement at $50,000 per year. In other words, even if he actually did consulting work during those three years that might warrant such payments—and there was no credible evidence in that regard—it is extremely unlikely that he would have obtained such a long-term agreement but for his role as a 'finder' (if not as a consolation for him not being appointed [chief executive officer]). Under these circumstances, the court believes it to be equitable to require forfeiture of compensation for that first year of consulting services due to its nexus (both causally and temporally) with the earned [$150,000] finder's fee, but consistent with the directive to take into account work performed by the defendant after termination of employment, to allow him to retain the second and third years' compensation."

A

We first address the defendant's claim that the court made certain factual findings that were unsupported by the record. Specifically, the defendant contends that the court clearly erred in finding that (1) he did not perform substantial work prior to his employment with the plaintiff, which began on January 1, 2013, that entitled him to the $150,000 finder's fee, and (2) during the September 10, 2019 hearing in damages, he attempted to offer into evidence numerous exhibits that the plaintiff's counsel had not seen before. We analyze each finding in turn.

1

The defendant contends that the court clearly erred in finding that he did not perform substantial work before being hired by the plaintiff in 2013 that entitled him to the $150,000 finder's fee. In support of his argument, the defendant relies primarily on testimony by Hertzmark, as reflected in the transcript of the September 27, 2016 hearing in damages, which was admitted as a full exhibit.[12] The defendant posits that the court on remand "generally credited" Hertzmark's testimony. This contention is unavailing.

Hertzmark provided inconsistent testimony as to whether the defendant earned the $150,000 finder's fee by providing services before he was employed by the plaintiff. Some of Hertzmark's testimony suggested that the defendant earned the $150,000 finder's fee strictly for work that he had completed in 2013 while employed by the plaintiff. Hertzmark testified that, during that time, the defendant provided information and advice to him about Captivate, prepared a financial model, assisted in the formulation of a letter of intent, and

[12] Hertzmark did not testify in person at the September 10, 2019 hearing in damages.

helped make a presentation. When asked whether it was "accurate that in 2013 [the defendant] earned compensation with respect to the Captivate transaction," whether the defendant "receive[d] cash compensation [in the form of the $150,000 finder's fee] for the work that he did in 2013 . . . for [the Captivate] transaction," and whether it was "accurate that relative to the work that [the defendant] did in connection with the Captivate/Generation transaction . . . in 2013, [the defendant] got [the $150,000 finder's fee]," Hertzmark answered in the affirmative.

In contrast, other portions of Hertzmark's testimony indicated that the defendant performed services before being hired by the plaintiff in 2013 that entitled him to the $150,000 finder's fee. Hertzmark testified that, "during the course of several years, [the defendant] and I . . . looked at a number of companies, thirty-five, thirty different companies, and ultimately settled in 2013 on Captivate. So . . . what you're hearing about with Captivate was the tail end of the relationship." Hertzmark further testified that "2013 was not the first time we approached and wrote a letter of intent to acquire Captivate." When asked whether "the arrangement that you had . . . with [the defendant] . . . dating back to 2010, 2011 [was] that when and if [the Captivate deal] closed, [the defendant] would be paid a finder's fee," Hertzmark answered affirmatively. Hertzmark further agreed with the statement that the defendant was "instrumental . . . in the initial introduction and development of [the Captivate deal] back to 2010, 2011, or when he was a consultant." In addition, when asked whether he would have paid the defendant the $150,000 finder's fee had he known that the defendant was a full-time employee of the plaintiff, Hertzmark testified that "we would have paid [the defendant] the . . . cash compensation [in the form of the $150,000 finder's fee] regardless of [the defendant's] employment

because [the defendant] had made the introduction many years ago" and the defendant had "performed some of the services in 2013."

"It is well established that, even if there are inconsistencies in a witness' testimony, [i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . It is not our role to reevaluate the credibility of witnesses or to overturn factual findings of a [trial] court unless they are clearly erroneous. . . . If there is any reasonable way that the [trier of fact] might have reconciled the conflicting testimony before [it], we may not disturb [its] [credibility determination]." (Citations omitted; internal quotation marks omitted.) *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 741. Moreover, a trier of fact is "free to credit one version of events over the other, even from the same witnesses." *Parker* v. *Slosberg*, 73 Conn. App. 254, 265, 808 A.2d 351 (2002).

In light of the foregoing principles, we conclude that the record supports the court's finding that the defendant did not perform any substantial services, prior to his employment with the plaintiff in 2013, entitling him to the $150,000 finder's fee. Portions of Hertzmark's testimony indicate that the defendant earned the $150,000 finder's fee solely on the basis of efforts that he made in 2013 while he was employed by the plaintiff. Although other portions of Hertzmark's testimony may support an opposite finding, the court was free to resolve that inconsistency by crediting only the portions of Hertzmark's testimony buttressing its finding.[13] Additionally, it is notable that the court expressly discredited

[13] In *HMN*, in a portion of a footnote to its statement that the amount ordered to be disgorged in the 2017 decision "appear[ed] to reflect compensation that the defendant had earned for consulting that he performed both prior to and subsequent to his nine month period of full-time employment with the plaintiff"; *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 58–59; this court detailed the testimony by Hertzmark indicating that the defendant had performed work on the Captivate deal prior to 2013.

the defendant's testimony that the majority of his work on the Captivate deal had been completed before he began his employment with the plaintiff, further indicating that the court deemed substantively similar testimony by Hertzmark to be incredible. Thus, we conclude that the court's finding was not clearly erroneous.[14]

2

The defendant also contends that the court clearly erred in finding that he attempted to offer into evidence numerous exhibits that the plaintiff's counsel had not seen previously. Although we agree that the record does not support this finding, we conclude that the court's error is harmless.

During the hearing on remand, the defendant offered more than a dozen additional exhibits into evidence, only two of which were admitted as full exhibits. The plaintiff's counsel objected to the admission of nearly all of the defendant's exhibits; however, counsel's objections were not based on representations that the

Id., 59 n.15. The relevant portion of that footnote should not be construed as this court making factual findings or intruding on the trial court's fact-finding function on remand; see footnote 8 of this opinion; rather, it should be read through the lens that this court in *HMN* was reviewing Judge Adams' damages award in the 2017 decision, which was predicated on the record before Judge Adams at that time.

[14] In addition to relying on Hertzmark's testimony in support of his argument, the defendant makes a passing reference to plaintiff's exhibit 20, which was admitted as a full exhibit and which is composed of a thread of e-mails reflecting communications, dating back to December 27, 2012, involving the defendant, Hertzmark, and/or a Gannett representative concerning Captivate. The defendant characterizes exhibit 20 as "show[ing] that substantial negotiations and communications regarding the [Captivate] deal were taking place before 2013." As the court found, however, "there may have been some initial/preliminary work in late December, 2012," and "only a sliver of activity [had] been identified as possibly occurring in late December, 2012," none of which entitled the defendant to the $150,000 finder's fee. Thus, exhibit 20 does not undermine the court's finding that the defendant did not perform substantial services prior to 2013 that entitled him to the $150,000 finder's fee.

documents had not been previously produced. With regard to defendant's exhibit D, a 2011 e-mail from the defendant to Hertzmark that was marked for identification only, the plaintiff's counsel indicated on the record that he had seen the exhibit for the first time that day; however, counsel did not comment further on that topic, and he objected to the admission of the exhibit for lack of a proper foundation. The record does not reflect protestations by the plaintiff's counsel that he had not seen any of the other exhibits offered by the defendant. Accordingly, insofar as the court found that the defendant sought to introduce "many" or a "large number" of exhibits that the plaintiff's counsel had not seen prior to the hearing on remand, that finding is not supported by the record.

Our conclusion that the court's finding was clearly erroneous does not end our inquiry. "[W]here . . . some of the facts found [by the trial court] are clearly erroneous and others are supported by the evidence, we must examine the clearly erroneous findings to see whether they were harmless, not only in isolation, but also taken as a whole. . . . If, when taken as a whole, they undermine appellate confidence in the court's [fact-finding] process, a new hearing is required." (Internal quotation marks omitted.) *Autry* v. *Hosey*, 200 Conn. App. 795, 801, 239 A.3d 381 (2020).

The defendant posits that the court's unsupported finding factored heavily in its determination of damages. We disagree. Throughout its decision, the court repeatedly referenced the defendant's discovery violations that led, inter alia, to his default as to liability. The defendant's noncompliance with discovery is separate and distinct from his purported transgression found by the court to have occurred during the hearing on remand. At most, the court's belief that the defendant engaged in malfeasance during the hearing on remand amplified its concern, predicated on the defendant's

discovery violations, about the "potential implications of allowing an adverse party to have the ability to stymie the court's ability to make a meaningful and reasonably accurate determination of the damages which a party is entitled to recover." The court's unsupported finding does not "undermine appellate confidence in the court's [fact-finding] process"; (internal quotation marks omitted) *Autry* v. *Hosey*, supra, 200 Conn. App. 801; and, accordingly, we conclude that the court's clearly erroneous finding is harmless.

B

We turn to the defendant's remaining claim that the court on remand abused its discretion in determining damages because the court failed to properly weigh the equities. On the basis of his appellate briefs, we distill the defendant's claims as (1) raising a specific claim of error as to the portion of the damages award ordering disgorgement of $50,000 of the $150,000 consulting fees and (2) challenging the damages award globally. First, as to the disgorgement of $50,000 of the $150,000 consulting fees, the defendant asserts that the court ordered disgorgement notwithstanding the plaintiff's failure to meet its burden to demonstrate that there was a link connecting all or some of the $150,000 consulting fees to the defendant's work on the Captivate deal in 2013, as instructed by this court in *HMN*. Second, the defendant contends that the damages award as a whole was inequitable because (1) the court failed to consider properly the undisputed fact that he had provided significant value to the plaintiff during his period of employment, (2) the court ignored the finding by the trial court in the 2017 decision, as recognized by this court in *HMN*, that his conduct was "uninformed," as opposed to undertaken with "a bad motive," and was "clearly not in the nature of corrupt or reprehensible behavior," (3) the court improperly weighed his noncompliance with discovery against him notwithstanding

that he had been sanctioned previously for his discovery violations, and (4) the damages award resulted in the plaintiff being unjustly enriched. (Internal quotation marks omitted.) We address each of these arguments in turn.

1

The defendant asserts that the court committed error in ordering him to disgorge $50,000 of the $150,000 consulting fees. Specifically, the defendant argues that, under the rationale of *HMN*, the plaintiff failed to meet its burden to establish that the $50,000 amount was earned for work performed by the defendant to advance the Captivate deal in 2013, as opposed to compensation for posttermination services provided by him to Captivate. We agree.[15]

In *HMN*, this court stated that, "[t]o the extent the defendant rendered some of the services for which he was compensated by third parties both prior and subsequent to his full-time employment with the plaintiff, some commensurate portion of the compensation received in exchange for those services cannot be said to have been gained by the defendant's breach and should not have been included in the court's order of disgorgement." *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 59. In a footnote, this court further indicated that there was a distinction between (1) the defendant earning the $150,000 consulting fees for performing services for Captivate after his employment with the plaintiff had been terminated and (2) the defendant being offered the opportunity to earn the $150,000 consulting fees as a result of his work

[15] In challenging the court's ordering disgorgement of $50,000 of the $150,000 consulting fees, the defendant also asserts that the court engaged in speculation and ignored evidence in the record in making certain factual findings. Because we conclude on other grounds that the court improperly ordered disgorgement of $50,000, we need not address the merits of these assertions.

on the Captivate deal in 2013. See id., 59 n.15 ("although [the defendant] was provided the opportunity to sign the agreement [with Captivate] as a consultant on the basis of his work in 2013, he performed the services specified in the agreement and earned the $50,000 per year subsequent to the termination of his employment with the plaintiff").

On remand, the court found that there was no credible evidence that the defendant performed any posttermination consulting work for Captivate to earn the $150,000 consulting fees. The court also was "concerned" and had "reservations" about the true nature of the $150,000 consulting fees, questioning whether they may have constituted a "tail" to the $150,000 finder's fee or a "consolation" in lieu of the defendant being named chief executive officer of Captivate; however, "[a]bsent evidence in that regard," the court determined that it "[could not] act on such concerns." Ultimately, the court found that, even assuming that there was credible evidence that the defendant earned the entirety of the $150,000 consulting fees for services he performed for Captivate following the termination of his employment with the plaintiff, there was a causal and temporal link between the defendant's work on the Captivate deal in 2013 and the $150,000 consulting fees, and, on the basis of that finding, the court determined that it was equitable to order disgorgement of $50,000 of the $150,000 consulting fees (that is, one year's worth of the fees).

As the defendant correctly sets forth in his principal appellate brief, under *HMN*, the court was not permitted on remand to order disgorgement of compensation earned by the defendant outside of his period of employment with the plaintiff. Although the defendant had been defaulted as to liability, it remained the plaintiff's burden to demonstrate that the $150,000 consulting fees, in whole or in part, were earned for work per-

formed by the defendant on the Captivate deal in 2013. See *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 50 ("The limit of [the effect of a default] is to preclude the defaulted defendant from making any further defense and to permit the entry of a judgment against him on the theory that he has admitted such of the facts alleged in the complaint as are essential to such a judgment. It does not follow that the plaintiff is entitled to a judgment for the full amount of the relief claimed. *The plaintiff must still prove how much of the judgment prayed for in the complaint he is entitled to receive*." (Emphasis in original; internal quotation marks omitted.)). The court's decision reflects that the plaintiff did not meet its burden, as the court found that, notwithstanding its concerns regarding their true nature, there was no credible evidence establishing that the $150,000 consulting fees were earned for services performed while the defendant was employed by the plaintiff.[16] Moreover, the court's reasoning for ordering disgorgement of $50,000 was predicated on the assumption that the defendant had earned the $150,000 consulting fees for services performed for Captivate after

[16] The court also found that there was no credible evidence that the defendant performed posttermination services for Captivate for which he had earned the $150,000 consulting fees; however, the defendant did not bear the burden to prove the same on remand.

In addition, we note that the court's finding that there was no credible evidence reflecting that the $150,000 consulting fees were earned for work done by the defendant on the Captivate deal in 2013 should not be conflated with the court's separate finding that the defendant's work on the Captivate deal in 2013 led to his *opportunity* to earn the $150,000 consulting fees, which comprised the foundation of the court's decision to order the disgorgement of $50,000. See *Hospital Media Network, LLC* v. *Henderson*, supra, 187 Conn. App. 59 n.15.

Last, we recognize that the court on remand highlighted the defendant's discovery violations as limiting the plaintiff's ability to demonstrate damages. Although, as the court reasonably found, the defendant's noncompliance with discovery generally hampered the plaintiff's efforts to prove damages, the plaintiff nonetheless was able to offer evidence concerning the defendant's posttermination consulting agreement with Captivate, a copy of which was admitted in full and about which Hertzmark was able to testify.

his employment with the plaintiff had ended. In light of the prohibition in *HMN* against ordering disgorgement of amounts earned before or after the termination of the defendant's employment with the plaintiff, the court's reasoning is untenable. For these reasons, we conclude that the court improperly ordered disgorgement of $50,000 of the $150,000 consulting fees.

2

The defendant next raises several arguments challenging the damages award as a whole. None of these arguments is persuasive.

First, we reject the defendant's argument that the court did not properly consider the significant value of his services to the plaintiff as its employee. The court found that the plaintiff's sales increased "substantially" during the defendant's employment and that "[t]here is no doubt that [the defendant] provided services of value to the plaintiff during the time he was an employee . . . ." In a vacuum, those findings would weigh against the wholesale forfeiture of an employee's salary or the wholesale disgorgement of third-party benefits received by the employee. Within its discretion, however, the court weighed those findings against a myriad of other facts that it found, including its finding that the defendant's sales performance decreased during the latter part of his employment, which, as the court reasonably inferred, stemmed from the defendant's involvement in activities unrelated to his employment with the plaintiff,[17] and which the court found raised "questions as

[17] The defendant asserts that the "evidence relating to exactly how much [he] was 'diverted' by the Captivate deal in 2013 is extremely thin . . . ." As the court found, and as the record reflects, the defendant performed substantive services in furtherance of the Captivate deal while employed by the plaintiff in 2013, including responding to questions sent by Hertzmark regarding Captivate and reviewing due diligence information. To the extent that the defendant claims that the court clearly erred in finding that he was diverted from his employment with the plaintiff in 2013, we reject that claim.

to whether the plaintiff was getting what it was paying for over the course of employment . . . .'' We perceive no abuse of the court's discretion in its balancing of these facts.

Next, in arguing that the damages award was inequitable, the defendant relies on the trial court's finding in the 2017 decision that his conduct was ''uninformed'' rather than ''done with bad motive'' or in the ''nature of corrupt or reprehensible behavior.'' (Internal quotation marks omitted.) This reliance is misplaced. As we explained in part I of this opinion, the findings in the 2017 decision supporting the prior damages award against the defendant were not binding on the trial court on remand. In its decision on remand, the court found that the defendant acted wilfully ''in the sense of the conduct being intentional as opposed to inadvertent'' and that, although the defendant claimed to believe that he ''still was operating as something in the nature of a consultant on a nonexclusive basis,'' the January 25, 2013 e-mail ''indicate[d] knowledge of impropriety in using the [plaintiff's] e-mail and server for nonemployer business—in turn suggesting knowledge that the conduct itself was improper.'' Additionally, the court found that the defendant's disloyal acts ''appear[ed] to have been essentially continuous from the start of his employment until termination, with the actual frequency seemingly moderate.'' The court was not precluded from making these findings, which are supported by the record, and relying on them to issue its damages award. Indeed, such findings fall squarely within the following guidance set forth in *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 718: ''[I]f an employee's disloyalty is confined to particular pay periods, so is the required forfeiture of compensation. . . . *Conversely, if the compensation received by a disloyal employee is not apportioned to particular time periods or items of work, and his or her breach of the duty of*

loyalty is wilful and deliberate, forfeiture of his or her entire compensation may result." (Citations omitted; emphasis altered.) Id., 734 n.11.

The defendant also argues that the court improperly weighed his noncompliance with discovery against him because he was penalized previously for his discovery violations by way of the trial court defaulting him as to liability on the plaintiff's claims, nonsuiting his counterclaim, and awarding the plaintiff $21,922.50 in attorney's fees. We are not persuaded. Simply stated, there is no suggestion in the court's decision that it used the defendant's discovery violations to supplant the plaintiff's burden to demonstrate its damages. Rather, the court's observations concerning the defendant's discovery failures reflect its determination that such failures should weigh against the defendant's requests for more favorable equitable treatment. See, e.g., *Certo* v. *Fink*, 140 Conn. App. 740, 743, 749–50, 60 A.3d 372 (2013) (concluding that, in determining damages, trial court did not commit error in relying on plaintiffs' estimate of damages when court credited plaintiffs, discredited defendant, and found that plaintiffs had to rely on estimate of damages as result of defendant's failure to provide discovery). We find no error in this regard.

Finally, the defendant argues that the damages award unjustly enriched the plaintiff because it enabled the plaintiff to recoup the sums ordered to be forfeited and to obtain the third-party benefits ordered to be disgorged while keeping the millions in dollars of revenue that the plaintiff earned during his employment, along with other benefits of his labor, as well as the $21,922.50 in attorney's fees previously awarded. See *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 738 ("[t]he judicial task [in applying the remedies of forfeiture and disgorgement] is to search for a fair and reasonable solution in light of the relevant considerations . . . and to avoid unjust enrichment to either party" (citation

omitted; internal quotation marks omitted)). This assertion is unavailing. The defendant overlooks the court's findings that, notwithstanding the value that he provided to the plaintiff, his sales performance decreased during the latter part of his employment, and it was "unknown how much more growth there would have been had the [defendant] been devoting 100 percent of his time—as an employee should—to [the plaintiff's] business rather than devoting unknown amounts of time to personal ventures. This is in the context of a business that was rapidly growing, and continued to grow even after the departure/termination of the [defendant]." Under these circumstances, we do not agree that the plaintiff was unjustly enriched.

In sum, except for the court's ordering disgorgement of $50,000 of the $150,000 consulting fees, we conclude that the court balanced the equities and properly utilized the equitable remedies of forfeiture and disgorgement in this case. Accordingly, we further conclude that, other than the court's ordering disgorgement of $50,000, the court did not abuse its discretion in awarding damages.

The judgment is reversed in part and the case is remanded with direction to vacate the damages award insofar as the court ordered the defendant to disgorge $50,000 of the $150,000 consulting fees; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JAMES K.*
(AC 42872)

Prescott, Moll and Suarez, Js.

Syllabus

Convicted of the crime of risk of injury to a child as a result of certain physical contact with his minor daughter, the defendant appealed to this court, claiming, inter alia, that the trial court violated his right to be tried before an impartial jury when it prohibited his counsel from asking prospective jurors during voir dire to express their opinions with respect to parents who kiss their children on the lips. When the state indicated it would seek to introduce into evidence a photograph of the defendant kissing the victim's half sister on the lips, defense counsel objected. The trial court first precluded defense counsel from asking prospective jurors about kissing on the lips because it was too specific to the facts of the case and limited defense counsel to asking prospective jurors about whether parents can have different methods of showing physical affection to their children. Thereafter, the court ruled the photograph inadmissible because it was prejudicial to the defendant. The defendant also had been charged with two counts of sexual assault in the first degree in connection with the incident with the victim. Although the jury initially had been unable to reach a unanimous verdict as to all three charges, the trial court delivered a "Chip Smith" instruction urging the jury to reach a verdict, after which it returned its verdict, which included a finding of not guilty as to the sexual assault charges. *Held*:

1. The trial court did not abuse its discretion when it prohibited defense counsel from asking prospective jurors to express their opinions with respect to parents who kiss their children on the lips: contrary to the defendant's assertion that the court improperly limited the scope of his voir dire because that issue was a central issue in the case and many people view it as inappropriate and offensive, the court's extremely narrow ruling was limited only to that question, it prevented counsel from improperly using voir dire to ascertain prospective jurors' opinions about evidence that would be presented at trial or implanting in their minds an opinion about that evidence, and, by permitting inquiry about the general topic of physical displays of affection, the court provided counsel wide latitude to determine whether prospective jurors had prejudices against parents kissing their children on the lips, and properly

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

struck a balance between the competing considerations of protecting a party's inviolate right to ask questions to uncover prejudice and avoiding inquiries that touch on facts before the jury; moreover, after the court excluded the photograph from evidence, there was no photographic evidence of the defendant kissing any child on the lips, the subject of the defendant's kissing the victim on the lips did not form the factual basis of any of the offenses with which he was charged, and the prosecutor did not rely on the evidence of kissing in her closing argument to the jury; furthermore, the defendant failed to demonstrate that the court's ruling resulted in harmful prejudice, as the evidence of kissing played only a slight role in the trial and was not inherently prejudicial in nature, and the jury's split verdict, in which it found the defendant not guilty of the sexual assault charges, supported the conclusion that the court's limitation on voir dire did not result in a jury that was unable to carefully and fairly consider each of the charges and the evidence related thereto.

2. The defendant could not prevail on his claim that the trial court abused its discretion by admitting into evidence a videotaped forensic interview of the victim: rather than summarily rejecting the defendant's assertion that the video was unduly prejudicial and cumulative of the victim's testimony at trial, as the defendant claimed, the broad language of the court's ruling suggested that the court considered and rejected the grounds of objection the defendant raised, and the court explicitly stated that the video fell within the medical diagnosis and treatment exception to the rule against hearsay (§ 8-3 (5)), with which the defendant agreed; moreover, the video was relevant and highly probative with respect to the defendant's conduct with the victim, the video was not admitted as constancy of accusation evidence, as the defendant contended, and it did not bolster the victim's credibility, as the interview was conducted by a clinical social worker, and the video did not contain the opinions of expert witnesses or statements of third parties; furthermore, the video was not unduly prejudicial, as it did not improperly emphasize the victim's testimony by permitting her to testify twice, it did not generate sympathy for her, as any expressions of empathy by the interviewer reflected her effort to build a rapport with the victim, and, although the victim's comments in the video were not identical to her trial testimony, the different language she used in the video was not so different in nature that it would likely engender strong feelings of sympathy over that which may have been engendered by her testimony at trial.

3. The defendant failed to establish that the trial court violated his rights to due process, to a fair and impartial trial, and to be convicted by means of a unanimous verdict when it declined to use language in his written request for instructions to urge the deadlocked jury to reach a verdict and, instead used model instructions from the Judicial Branch website: the defendant was not entitled to the instruction he proposed,

which condoned a hung jury, nothing concerning the context or circumstances in which the court delivered the model instructions led to the conclusion that the instructions were coercive, as the fact that the jury had engaged in deliberations for three days and requested the playback of certain testimony and evidence prior to sending the court a note stating that it was deadlocked merely reflected, at most, that the jury was fulfilling its duty of carefully considering the evidence; moreover, the jurors' note and stated belief in that note that additional deliberation time would not be fruitful did not make the court's instructions coercive or give the unwarranted impression that a verdict was required, as the note did not refer to hostility among jurors or indicate they had not followed their oaths or would not continue to follow their oaths after additional instruction from the court.

4. This court declined to exercise its supervisory authority over the administration of justice to require trial courts to instruct deadlocked juries that they need not reach a verdict and that jurors have the right to disagree with respect to the proper verdict; because the Supreme Court has explicitly addressed the issue of what instructions are proper when a jury is deadlocked, it would be inappropriate for this court to overrule, reevaluate, or reexamine the propriety of the instructions.

Argued February 2—officially released December 28, 2021

Procedural History

Substitute information charging the defendant with two counts of the crime of sexual assault in the first degree and one count of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *B. Fischer*, *J.*; thereafter, the court denied the defendant's motion to preclude certain evidence; verdict and judgment of guilty of risk of injury to a child, from which the defendant appealed to this court. *Affirmed.*

Pamela S. Nagy, Supervisory Assistant Public Defender, for the appellant (defendant).

Samantha L. Oden, former deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Maxine V. Wilensky*, senior assistant state's attorney, for the appellee (state).

Opinion

SUAREZ, J. The defendant, James K., appeals from the judgment of conviction, rendered following a jury trial, of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[1] The defendant claims that (1) the trial court violated his right to a fair trial and to be tried before an impartial jury by restricting defense counsel's examination of prospective jurors, (2) the trial court improperly admitted into evidence a videotaped forensic interview of the victim, (3) the trial court violated his rights to due process, to a fair and impartial trial, and to be convicted by means of a unanimous verdict because the deadlocked jury instructions that it provided to the jury were coercive and misleading, and (4) this court, in the exercise of its supervisory authority over the administration of justice, should require trial courts, when delivering deadlocked jury instructions, to instruct the jury that it need not reach a verdict and that jurors have the right to disagree with respect to the proper verdict. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. The defendant is the victim's biological father. In 2010, when the victim was approximately six years old, the defendant obtained full physical custody of the victim as a consequence of drug abuse and mental health issues affecting the victim's biological mother. Initially, the victim resided with the defendant; her stepmother, M; her half sister, H; and other relatives. The victim and H are close in age, shared a close bond, and attended

[1] The court imposed a sentence of twenty years of incarceration, five of which are mandatory, execution suspended after sixteen years, followed by fifteen years of probation. The jury found the defendant not guilty of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a).

the same school. Later, the defendant, M, H, and the victim moved to a different residence.

On numerous occasions, the defendant used physical force to discipline the victim and H. The defendant often struck the victim on her buttocks, back, and arms with his bare hands or physical objects such as a belt or an extension cord. Occasionally, if the use of force resulted in visible injuries to the victim, the defendant would make the victim conceal her bruises with clothing or he would keep her home from school.

One night in 2011 or 2012, when the victim was seven or eight years of age, the defendant verbally and physically assaulted M in the victim's presence, following which M and H left the residence. The victim, preparing to take a shower, went into her bedroom, undressed, and wrapped herself in a towel. The defendant entered the bedroom and told the victim that he had received a telephone call from her teacher and was upset to have learned that the victim had misbehaved in class. After the victim and the defendant discussed this matter, the defendant instructed the victim to remove her towel and bend over a nearby bed. The victim, expecting to be struck by the defendant as a form of discipline, complied with the defendant's instruction.

The victim positioned herself on all fours on the bed. As the defendant stood behind her, at the edge of the bed, he touched the victim's anus and her vagina with his penis. Penetration did not occur.[2] As the incident

[2] In reciting the facts that the jury reasonably could have found in reaching its verdict, we are mindful that, as we noted in footnote 1 of this opinion, the jury found the defendant not guilty of two counts of sexual assault in the first degree. One count of sexual assault required a finding that the defendant had penetrated the victim's anus, and the other count of sexual assault required a finding that the defendant had penetrated the victim's vagina. See General Statutes § 53a-70 (a) (1).

The jury found the defendant guilty of risk of injury to a child in violation of § 53-21 (a) (2), which did not require a finding that penetration had occurred but required a finding that the defendant had contact with the intimate parts of the victim in a sexual and indecent manner that was likely to impair her health or morals.

progressed, the defendant pushed the victim down so that her head and chest were on the bed. When the victim told the defendant to stop touching her, he responded by telling her to be quiet. Despite the fact that the defendant's hands were on the victim's waist, he stated that he was using "his thumb." After a few minutes, the defendant stopped what he was doing, told the victim to remain bent over until he left her bedroom, and walked into another room. The victim was confused by the defendant's conduct and knew that it was "bad . . . ." She proceeded to use the shower. After the victim showered, the defendant told her that they were going out to get pizza for dinner, and he stated that "what happened in the house stays in the house." The victim understood this to mean that the defendant did not want her to discuss what he had done to her in the bedroom, and she believed that, if she told anyone about it, it would either happen again or the defendant would punish her by beating her.

The defendant and M later separated, and the victim thereafter resided with the defendant and his new girlfriend. The victim resided there until December, 2015, when the defendant was arrested on charges unrelated to the present case. The victim was placed in the custody of her maternal grandmother, B. Thereafter, the Department of Children and Families (department) investigated allegations that the victim had suffered physical abuse caused by the defendant. The department also investigated concerns expressed by B that the defendant had acted inappropriately toward the victim because he had a habit of kissing the victim on the lips. Ultimately, the victim disclosed to a department social worker that the defendant had done something that made her uncomfortable and that he "tried to say it was his finger . . . ." During a forensic interview at Yale-New Haven Hospital's Child Sexual Abuse Clinic in 2016, the victim provided details of the incident

involving the defendant's contact with her intimate parts in her bedroom. The defendant's arrest and conviction followed. Additional facts will be set forth as necessary.

I

First, the defendant claims that the trial court violated his right to a fair trial and to be tried before an impartial jury by restricting defense counsel's examination of prospective jurors. Specifically, the defendant claims that the court improperly prohibited defense counsel from asking prospective jurors to express their opinions with respect to parents who kiss their children on the lips. We disagree.

The following additional facts and procedural history are relevant to this claim. On October 16, 2018, the second day of jury selection, defense counsel alerted the court to the fact that the state was in possession of photographs depicting the defendant kissing H on the lips. Defense counsel expressed her belief that the state intended to introduce these photographs in evidence over defense counsel's objection. The court, *B. Fischer*, *J.*, added that, during the victim's forensic interview, the victim indicated that the defendant had kissed her on the lips. In light of the possibility that evidence of the defendant's habit of kissing his daughters on the lips was likely to be before the jury, defense counsel opined that some potential jurors would have a very strong reaction to such evidence. She argued that it was part of her obligation in selecting a fair and impartial jury to ask prospective jurors to express their feelings about that behavior. Defense counsel provided the court with the type of inquiry she believed was appropriate, stating: "I guess I would ask a venireperson, do they have opinions about how parents might show affection to their children and . . . might they have opinions about whether parents kiss their children

. . . as part of showing affection, and might they also have any strong opinions one way or another about whether . . . it's okay for parents to kiss their children on the lips, in terms of . . . is that a common thing in their mind in terms of showing affection." The prosecutor objected to any inquiry concerning kissing or "physically showing affections between a parent and child."

The court responded, "[t]he kissing is too fact specific. You know, prospective jurors may not be questioned regarding their predisposition to decide issues with respect to evidence that may be offered at trial or with the intent to condition them to prejudge issues that will affect the outcome of the trial. I have no issues with a question along the following lines . . . 'Do you understand that parents can have different methods of showing physical affection to their children' or a question like that, but to specifically ask about kissing on the lips is too fact specific." Defense counsel asked whether a question about kissing on the lips could be asked in the event that a venireperson raised the issue. The court stated that such a follow-up inquiry was not permissible because it would be "too fact specific." The court clarified that defense counsel could ask questions about a parent engaging in "different methods of showing physical affection to their child" but that defense counsel could not ask about kissing on the lips. Defense counsel stated that she disagreed with the court's ruling but that she would abide by it.

Later, during the second day of jury selection, defense counsel asked several venirepersons whether they had opinions concerning how parents show affection to their children.[3] The prosecutor did not object to defense counsel's examination in this regard, and the court did not interfere with the examination in this regard. For

[3] In this opinion, we will use the initials, rather than full names, of venirepersons to protect their privacy interests.

example, during questioning of venireperson M.A., the following colloquy occurred:

"Q. . . . Do you have any opinion about how parents show affection to children?

"A. I think there's a lot of different ways that parents can show affection.

"Q. It kind of runs the gamut, right?

"A. Yep.

"Q. In your personal opinion, do you think that, you know, do you have, kind of like, what's appropriate versus inappropriate?

"A. Well, I have, you know, how my parents showed me affection throughout my life and . . . that's basically it, you know.

"Q. Okay. But if you saw sort of something other than what your parents showed you.

"A. Um-hm.

"Q. Do you . . . you know, I guess would you just have an opinion as to what was appropriate versus—

"A. I wouldn't make any sort of, like, judgmental determinations on it if it was the proper way to show affection or not."

During defense counsel's examination of venireperson K.G., the following colloquy occurred:

"Q. How about different forms of parents showing affection for their kid; do you think some are kind of okay and some are not okay?

"A. In terms of like hugging a child?

"Q. Hugging. Kissing. Yeah.

"A. Or just kissing your child, that's fine.

"Q. Okay. Anything that in your mind would cross the line that you think is just totally inappropriate?

"A. Not if it's not abusive, no."

During defense counsel's examination of venireperson C.D., the following colloquy occurred:

"Q. . . . Do you have any opinion about how parents show children affection?

"A. I think it's great that they do. I think any parent should show their children affection.

"Q. Okay. Do you have an opinion as to . . . what might be appropriate versus inappropriate?

"A. That's what I am when we're hugging and, you know, giving encouragement and being positive. That's kind of what I know."

During defense counsel's examination of venireperson E.B., the following colloquy occurred:

"Q. . . . Do you have any opinions about how parents should show love or affection toward their children physically?

"A. As much as you can.

"Q. Um-hm.

"A. There's a lot that you can do.

"Q. Um-hm. Anything in your mind that, like, crossed the line where it would become kind of inappropriate?

"A. More than a hug and a kiss, I would imagine."

Finally, during defense counsel's examination of venireperson J.S., the following colloquy occurred:

"Q. . . . Do you have any sort of opinion one way or the other about how parents show affection for their children?

"A. I mean, yeah, I mean, there's some parents that will kiss their kids on the cheek, there's other ones that kiss their kids on the lips. I mean, different breakpoints, to certain things.

"Q. Right.

"A. I mean, I've showered with both my daughters when they were younger, but you get to a point where it's like, all right, now that's gotta stop.

"Q. Sure. Do you have any opinion one way or the other, or you just know that it kind of happens?

"A. I think that . . . it happens. Right. And . . . it changes depending on the family dynamic."

The following day, the third day of jury selection, the court invited the parties to make arguments concerning the admissibility of a photograph of the defendant kissing H on the lips. The prosecutor represented that she intended to introduce the photograph into evidence, arguing that it was probative with respect to the type of kissing the defendant engaged in with his daughters. Defense counsel argued that the photograph was "inflammatory" and that it would arouse the passions of the jurors. Defense counsel argued that, when compared to the high degree of prejudice that flowed from the photograph, it had only limited probative value, as it was not direct evidence of any of the crimes with which the defendant stood charged. Defense counsel argued that it was misconduct evidence that merely corroborated the victim's testimony that the defendant had a habit of kissing her on the lips.

The court excluded the photograph from evidence. The court stated: "I'm not going to allow it in. It is a picture of [H], who is not the complainant here. Clearly, as I understand it, there will be evidence from the complainant that the defendant did kiss her on the mouth . . . but we'll wait to hear that testimony. But this is

separate. This is not the complainant's photo, it's the stepsister. The court finds it's too inflammatory, too prejudicial to the defendant." During the remaining three days of jury selection that followed the court's ruling, defense counsel did not question prospective jurors about their opinions, if any, with respect to displays of affection between parents and their children.

Prior to the victim's testimony at trial, defense counsel expressly agreed that testimony about the fact that the defendant had kissed the victim on the lips was admissible. The victim subsequently testified that the defendant had a habit of kissing her on the lips, that this behavior "bother[ed]" her, and that she asked the defendant to kiss her on the cheek instead. The victim testified, however, that the defendant continued to kiss her on the lips.[4] Kelly Adams, a department investigator, testified at trial that, when she spoke with B, she stated that "she believed something happened because [the defendant] would kiss [the victim on] the mouth and she didn't like it, she said it made her feel very uncomfortable . . . ." Adams further testified that B's statements led her to question the victim as to whether anyone had done something that made her feel uncomfortable, and that this inquiry resulted in the victim's initial disclosure of sexual abuse by the defendant. Adams testified that the defendant mentioned to her that he was aware of the fact that others had told her that he had kissed the victim on the lips but that he had not behaved inappropriately. During closing argument, the state did not rely on evidence related to the defendant's habit of kissing the victim on the lips.

[4] The state also presented evidence of statements the victim made in her forensic interview, during which she stated that the defendant would kiss her on her mouth when she was going to travel somewhere "really far" away. The victim stated that, when this type of kissing occurred, both her mouth and the defendant's mouth would remain closed. She stated that her grandmother, B, thought the kissing was "kinda weird" and that "no one should be kissing you on your mouth."

As he did at trial, the defendant argues on appeal that the court improperly limited the scope of his examination of prospective jurors. The defendant argues that the evidence of the defendant's kissing his daughter on the lips was "highly controversial," "many people view [this type of behavior] as inappropriate and offensive," the conduct "was a central issue in this case," and the court's prohibition on questions directly addressing this conduct "violated his constitutional rights to a fair trial and to be tried by an impartial jury . . . ." The defendant argues that the court's ruling precluded him from asking questions of prospective jurors that may have reflected the existence of bias and impartiality. The defendant argues that the inquiry he wanted to undertake was not designed "to ask jurors how they would decide the facts or issues in this case; rather, [the defendant] wanted to determine if jurors would be unable to judge this case fairly once they heard that evidence." The defendant also argues that the curtailed inquiry limited to forms of affection was not adequate, for it failed to give him any insight as to whether potential jurors had strong emotional reactions to a parent kissing a child on the lips.

Having set forth the nature of the defendant's claim, we next set forth the relevant principles of law. "Voir dire plays a critical function in assuring the criminal defendant that his [or her] [s]ixth [a]mendment right to an impartial jury will be honored. . . . Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. . . . Our constitutional and statutory law permit each party, typically through his or her attorney, to question each prospective juror individually, outside the presence of other prospective jurors, to determine [his or her] fitness to serve on the jury. . . . Because the purpose of voir dire is to discover if there is any likelihood that some prejudice is in the [prospective] juror's mind [that]

will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted [to ask] questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. . . . The purpose of voir dire is to facilitate [the] intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause." (Internal quotation marks omitted.) *State* v. *Holmes*, 334 Conn. 202, 222–23, 221 A.3d 407 (2019); see also *State* v. *Rios*, 74 Conn. App. 110, 114, 810 A.2d 812 (2002) (discussing constitutional and statutory basis for right to question prospective jurors individually), cert. denied, 262 Conn. 945, 815 A.2d 677 (2003). Moreover, we recognize that the right to a voir dire examination of each prospective juror to elicit the indicia of prejudice "cannot be replaced by a court's charge, which is addressed to a group and does not elicit answers." *State* v. *Rogers*, 197 Conn. 314, 318, 497 A.2d 387 (1985).

Our decisional law reflects, however, that the type of inquiry that is permissible to uncover prejudice on the part of prospective jurors has its limits. "The court has a duty to analyze the examination of venire members and to act to prevent abuses in the voir dire process." *State* v. *Dolphin*, 203 Conn. 506, 512, 525 A.2d 509 (1987). "[I]f there is any likelihood that some prejudice is in the [prospective] juror's mind [that] will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted [to ask] questions designed to uncover that prejudice. . . . The latitude . . . afforded the parties in order that they may accomplish the purposes of the voir dire [however] is tempered by the rule that [q]uestions addressed to prospective jurors involving assumptions or hypotheses concerning the evidence which may be offered at the trial . . . should be discouraged . . . . [A]ll too frequently such inquiries represent a

calculated effort on the part of counsel to ascertain before the trial starts what the reaction of the venire[-person] will be to certain issues of fact or law or, at least, to implant in his mind a prejudice or prejudgment on those issues. Such an effort transcends the proper limits of the voir dire and represents an abuse of the statutory right of examination. . . .

"Thus, we afford trial courts wide discretion in their supervision of voir dire proceedings to strike a proper balance between [the] competing considerations . . . but at the same time recognize that, as a practical matter, [v]oir dire that touches on the facts of the case should be discouraged. . . . [T]he permissible content of the voir dire questions cannot be reduced to simplistic rules, but must be left fluid in order to accommodate the particular circumstances under which the trial is being conducted. Thus, a particular question may be appropriate under some circumstances but not under other circumstances. . . . The trial court has broad discretion to determine the latitude and the nature of the questioning that is reasonably necessary to search out potential prejudices of the jurors." (Citation omitted; internal quotation marks omitted.) *State* v. *Patel*, 186 Conn. App. 814, 846–47, 201 A.3d 459, cert. denied, 331 Conn. 906, 203 A.3d 569 (2019). "The court has wide discretion in conducting the voir dire . . . and the exercise of that discretion will not constitute reversible error unless it has clearly been abused or harmful prejudice appears to have resulted." (Citations omitted.) *State* v. *Dahlgren*, 200 Conn. 586, 601, 512 A.2d 906 (1986).

Our analysis must focus on "the scope of the trial court's ruling, i.e., what specific question or questions actually were prohibited." *State* v. *Lugo*, 266 Conn. 674, 684, 835 A.2d 451 (2003). As discussed previously in this opinion, in light of the likelihood that the state would present evidence that the defendant had shown

affection to one or more of his children by kissing them on the lips, the court's prohibition was limited only to the question related to a parent kissing a child on the lips. The court, nonetheless recognizing the nature of the inquiry sought by defense counsel, expressly clarified that its ruling did not preclude defense counsel from asking whether prospective jurors had opinions about parents using different methods of physical affection toward a child.

Because the trial court is vested with broad discretion in conducting the voir dire, there are few, if any, bright-line rules that we may employ in reviewing its rulings related thereto. Indeed, this court has observed that, "[d]espite its importance, the adequacy of voir dire is not easily subject to appellate review." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Rios*, supra, 74 Conn. App. 115. We note that, in the present case, the court's ruling was extremely narrow, and the ruling prohibited only an inquiry that was related to specific evidence in the case. The ruling, therefore, prevented defense counsel from using voir dire for the improper purposes of ascertaining prospective jurors' opinions about the evidence that would be presented at trial or implanting in the jurors' minds an opinion about the evidence. We also note that the court provided defense counsel wide latitude to inquire whether prospective jurors had opinions about the general topic of physical displays of affection. Although the defendant's arguments suggest otherwise, physical displays of affection may include kissing on the lips. Thus, to the extent that defense counsel deemed it important to determine if prospective jurors had prejudices against parents kissing their children on the lips, the court afforded defense counsel latitude to accomplish the purposes of the voir dire in that it permitted defense counsel to raise the general topic of a parent's physical display of affection. Our assessment in this regard is

proven by the fact that, although defense counsel asked only five prospective jurors about a parent's physical display of affection, three of those prospective jurors (K.G., E.B., and J.S.) stated an opinion about kissing. Moreover, one of these prospective jurors (J.S.) stated an opinion about kissing on the lips.

As both this court and our Supreme Court have observed, the trial court in supervising voir dire must balance the competing considerations of protecting a party's inviolate right to ask questions to uncover prejudice and avoiding inquiries that touch on the facts before the jury. See, e.g., *State* v. *Pollitt*, 205 Conn. 61, 75, 530 A.2d 155 (1987); *State* v. *Rios*, supra, 74 Conn. App. 117–18. We are convinced that the court properly struck a balance between these considerations and permitted an inquiry that was sufficient to uncover juror bias against a parent's physical display of affection, including kissing on the lips.

A court's exercise of its discretion to restrict voir dire "will not constitute reversible error unless it has clearly been abused or harmful prejudice appears to have resulted." *State* v. *Dahlgren*, supra, 200 Conn. 601; see also *State* v. *Dolphin*, supra, 203 Conn. 512 (same), and cases cited therein. Beyond concluding that the court did not abuse its discretion, we likewise conclude for the reasons that follow that the defendant has failed to demonstrate that the court's ruling resulted in harmful prejudice.[5]

[5] Although the state correctly refers in its appellate brief to the fact that our decisional law directs us to consider whether a restriction of voir dire reflects an abuse of discretion or harmful prejudice to a defendant, it also argues that the defendant is unable to demonstrate that he was "harmed" by the court's ruling. The defendant responds that "the state is wrong that any error was harmless" and that "[a] trial before jurors who harbor prejudices that work against the defendant can never be harmless." In accordance with prior decisions, our evaluation of whether reversal of the judgment is warranted is focused on whether the court's ruling constituted an abuse of discretion or whether it resulted in harmful prejudice to the defendant.

As we stated previously in this opinion, at the time that the court made the ruling at issue, it had yet to rule on the photograph that the state wanted to introduce that depicted the defendant kissing H on the lips. The following day of jury selection, the court ruled that the photograph was not admissible. It appears that defense counsel's desire to uncover possible prejudice related to a parent kissing a child on the lips was largely motivated by the possibility that this photograph would be part of the evidence.[6] Following its exclusion, there was no photographic evidence of the defendant kissing the victim, or any child, on the lips. Furthermore, as we previously discussed, the subject of the defendant's kissing the victim on the lips was not a prominent part of the evidence, which was presented to the jury over the course of three days. Although the jury heard evidence that the defendant had kissed the victim on the lips, that the victim objected to the kissing, and that B's concern that the defendant's habit of kissing the victim on the lips led Adams to investigate whether the victim had been sexually abused, the defendant's conduct in kissing the victim on the lips did not form the factual basis of any of the offenses with which he stood charged. Moreover, the prosecutor did not rely on the evidence of kissing during her closing argument. Finally, we note that the defendant's prejudice argument stems from his belief that the jury would be "unable to judge this case fairly once they heard [the] evidence [related to his kissing the victim on the lips]." The fact that the jury rendered a split verdict in this case, finding the defendant not guilty of the more serious sexual assault charges; see footnote 2 of this opinion; lends some support to our conclusion that the limitation on voir dire did not result in a jury that was unable

[6] As we noted previously in this opinion, following the court's ruling to exclude the photograph of the defendant kissing H on the lips, jury selection continued over the course of three days. During these three days, however, defense counsel did not ask any prospective juror about physical forms of affection.

to carefully and fairly consider each of the charges and the evidence related thereto. Given the slight role that the evidence of kissing played in the trial, the fact that the evidence that was presented to the jury related to kissing was not inherently prejudicial in nature, we are not persuaded that harmful prejudice resulted to the defendant as a result of the court's ruling.

II

Next, the defendant claims that the court improperly admitted into evidence a videotaped forensic interview of the victim. We disagree.

The following facts are relevant to this claim. Prior to trial, the state filed a notice of its intent to offer into evidence a video recording of the victim's forensic interview that occurred on March 9, 2016, and was conducted by Monica Vidro Madigan, a clinical social worker employed by the Yale-New Haven Hospital's Child Sexual Abuse Clinic. Later, the defendant filed a motion in limine to preclude the admission of the video. The defendant assumed for purposes of his motion that the victim would testify at trial and would be able to recall and narrate the details of her sexual abuse allegations against the defendant. The defendant expressly stated that he did not object to the admissibility of the video on hearsay grounds. Instead, the defendant raised what he characterized as an objection related to "relevance and bolstering . . . ." The defendant argued that the video had limited probative value and was unduly prejudicial to him. In arguing that it was unduly prejudicial, defense counsel argued that it was unnecessary and cumulative evidence of the facts to be elicited during the victim's trial testimony, and it would improperly bolster the victim's testimony.

Following the victim's trial testimony, on October 24, 2018, the court heard arguments on the motion. Defense

counsel reiterated that the video would not add anything to the victim's trial testimony and argued that the admission of the video would constitute an improper bolstering of that testimony. Defense counsel argued that "[the victim] had clear recollection. She did not have any confusion about the details. This isn't a case like some where the child [victim] kind of broke down and had trouble and, therefore, the state tried to offer this evidence [of prior disclosure] . . . . [The victim] had clear detail, clear memory and so I think to pile on another version of her statement, it's very prejudicial and I think it's cumulative . . . . It's really important to be clear about bolstering. And so I think, here, when you're allowing . . . the jury to hear twice, once live in person, once on a tape-recorded forensic interview from the same complainant, that really . . . is highly prejudicial. . . .

"[T]here's nothing contained in that forensic interview which was not already testified to by [the victim] in front of this jury. It would simply be a rerun of her testimony, of course without any sort of cross-examination there, and I think . . . its prejudicial impact outweighs its probative value. I don't think it has any probative value. We've heard her testimony." Defense counsel acknowledged, however, that she was unaware of any authority to support the proposition that a forensic interview is not admissible evidence.

Responding to the argument that the evidence was cumulative, the prosecutor argued that the details provided by the victim during the forensic interview differed in some ways from the details provided by the victim during her trial testimony. For example, the prosecutor stated that the victim provided different descriptions of the alleged anal penetration by the defendant.[7]

[7] Despite the many factual similarities, or overlap, between the victim's trial testimony and the victim's forensic interview, our review of these two matters reveals that factual differences do exist. Appellate review of the victim's trial testimony is greatly hampered by the fact that the victim

The prosecutor also responded that the state was seeking the admission of the video under the medical diagnosis and treatment exception to the rule against hearsay.

The court stated that "the record obviously reflects that the [victim] did appear here at this trial and was subject to cross-examination, and the forensic interview will be admitted, and that's going to be admitted under the medical diagnosis and treatment exceptions to the hearsay rule, [Connecticut Code of Evidence § 8-3 (5)], and our existing case law under *State* v. *Griswold*, [160 Conn. App. 528, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015)]. You know, the purpose of the interview is to minimize trauma so a child doesn't have to repeat allegations to numerous officials such as school officials, [the department], police, et cetera, and it also . . . assesses medical and mental health needs of the particular child, and it also advances and coordinates the prompt investigation of suspected cases of child abuse. So, for those reasons, and no

testified while, for demonstrative purposes, pointing to one or more visual aids depicting the human body. In many instances, however, neither the court nor the prosecutor clarified for the record what part of the human body she was pointing to while testifying. The consequence of that failure is that, at times, the record is ambiguous with respect to the most critical facts of the case, namely, the intimate part or parts of the victim's body with which the defendant had made contact. In the victim's trial testimony, she appears to have described the defendant touching her anus and feeling "a sharp pain inside of [her]" but that she "wasn't sure what it was . . . ." While apparently referring to contact with her vagina, she testified that she believed the contact was painful " 'cause [the defendant] tried to go in" and "[i]t didn't work." The victim did not state what the defendant had used to make contact with her, except that he stated that it was "[h]is thumb."

Unlike the victim's trial testimony, in the victim's forensic interview she added additional details about the defendant's touching of her vagina and anus. Specifically, she stated that, when the defendant was touching "both parts," meaning her vagina and her anus, she "felt something else going inside of me . . . ." The victim also stated that, although the defendant stated that he was using his thumb during the incident, in light of the fact that she felt the defendant's hands on her waist at the time, she believed that it was "[a] man's private."

existing case law to support the defendant's position, I am going to deny the defendant's motion." The video of the forensic interview was admitted into evidence during the testimony of Vidro Madigan.[8]

On appeal, the defendant argues as he did at trial that "[t]he only purpose of the video was to bolster [the victim's] testimony at trial, and it was unnecessary because she testified. Moreover, the prejudicial effect of this evidence greatly outweighed its probative value. By allowing the state to double-team its case in this manner when [the victim's] credibility was crucial to the outcome, the court committed harmful error." The defendant argues that the court summarily rejected the basis of his objection by stating that the video was admissible under the medical treatment and diagnosis exception to the rule against hearsay but failed to address the issue of whether the probative value of the video, if any, was outweighed by its prejudicial effect. The defendant argues that the court failed to analyze the objection raised in that it "automatically" determined that the video was admissible after concluding that it fell within the hearsay exception and, thus, failed to exercise any discretion with respect to the issue of whether the evidence was unduly prejudicial. The defendant argues that, even if the court conducted the proper balancing test, it incorrectly exercised its discretion to admit the video in evidence.

"We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the

[8] Later, in the absence of objection by the defendant, the state offered, and the court admitted into evidence, a transcript of the video. The defendant's claim on appeal is limited to the admission of the video but not the transcript. Although we reject the claim that the video was inadmissible and, thus, need not reach the issue of whether the admission of the video amounted to harmful evidentiary error, we observe that the admission of the transcript of the video would pose a significant hurdle to the defendant in attempting to demonstrate that the admission of the video was harmful to him. See footnote 9 of this opinion.

law . . . for an abuse of discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . The trial court has wide discretion to determine the relevancy [and admissibility] of evidence . . . . In order to establish reversible error on an evidentiary impropriety . . . the defendant must prove both an abuse of discretion and a harm that resulted from such abuse." (Citations omitted; internal quotation marks omitted.) *State* v. *Cecil J.*, 291 Conn. 813, 818–19, 970 A.2d 710 (2009).[9]

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1. Irrelevant evidence is inadmissible and, unless there is a basis in law for its exclusion, "[a]ll relevant evidence is admissible . . . ." Conn. Code Evid. § 4-2. "Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice . . . or by considerations of . . . needless presentation of cumulative evidence." Conn. Code Evid. § 4-3. "Of course, [a]ll adverse evidence is

[9] "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends [on] a number of factors, such as the importance of the . . . testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Ayala*, 333 Conn. 225, 231–32, 215 A.3d 116 (2019).

damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the [jurors]." (Internal quotation marks omitted.) *State* v. *Wilson*, 308 Conn. 412, 429–30, 64 A.3d 91 (2013).

"By cumulative evidence is meant additional evidence of the same general character, to the same fact or point which was the subject of proof before." *Waller* v. *Graves*, 20 Conn. 305, 310 (1850). "In excluding evidence on the ground that it would be only cumulative, care must be taken *not* to exclude merely because of an *overlap* with evidence previously received. To the extent that evidence presents new matter, it is obviously not cumulative with evidence previously received." (Emphasis in original; internal quotation marks omitted.) *State* v. *Parris*, 219 Conn. 283, 293, 592 A.2d 943 (1991).

Preliminarily, we reject the defendant's contention that the court, having concluded that the video was admissible under the medical diagnosis and treatment exception to the rule against hearsay; see Conn. Code Evid. § 8-3 (5); "summarily reject[ed]" his argument that the video should be excluded because it was unduly prejudicial and cumulative. The record reflects that the court, in its oral ruling, did not specifically address the defendant's arguments that the video, although admissible under a well established exception to the rule against hearsay, should be excluded because it was unduly prejudicial and cumulative. Instead, the court explicitly stated that the evidence fell within the hearsay objection. The court, however, also used broad language that suggests that it had considered and rejected the specific grounds of the defendant's objection by

stating that it was unable to identify "existing case law to support the defendant's position . . . ."

Thus, the court's oral ruling does not unambiguously reflect whether it exercised its discretion and considered the grounds raised in the defendant's objection. Nonetheless, our review of the relevant portion of the transcript of the trial proceedings does not suggest that the court failed to consider both of these grounds and did not exercise its discretion. "In the discretionary realm, it is improper for the trial court to fail to exercise its discretion." *State* v. *Lee*, 229 Conn. 60, 73–74, 640 A.2d 553 (1994). Although the court did not explicitly refer to these grounds, there is nothing in the court's statements to indicate that it erroneously believed that it lacked the discretion to exclude the evidence at issue. Cf. id. (record reflects that trial court's evidentiary ruling was result of mistaken belief that evidence was categorically inadmissible); *State* v. *Martin*, 201 Conn. 74, 88–89, 513 A.2d 116 (1986) (record reflects that trial court's evidentiary ruling was result of expressed belief that it lacked discretion to preclude evidence). In light of the foregoing and in conformity with our precedent, we will not presume error in the court's analysis but instead presume that the court properly exercised its discretion and considered the merits of the objection raised. "In Connecticut, our appellate courts do not presume error on the part of the trial court. . . . Rather, the burden rests with the appellant to demonstrate reversible error." (Internal quotation marks omitted.) *Pettiford* v. *State*, 179 Conn. App. 246, 260–61, 178 A.3d 1126, cert. denied, 328 Conn. 919, 180 A.3d 964 (2018).

We now turn to the merits of the evidentiary claim. We readily conclude that the forensic interview of the victim by Vidro Madigan was relevant. Therein, the victim described in detail the incident giving rise to the offenses with which the defendant was charged. The

defendant does not argue that the video lacked probative value because it did not tend to make it more or less probable that the defendant committed one or more of the charged offenses. Instead, the defendant argues that "[t]he video had little, if any, probative value because [the victim], who was fourteen years old at the time of trial, testified without hesitation and gave a complete recounting of her allegations. She did not seem confused or uncertain about any of the details and did not claim she could not remember them." These arguments lead us to observe that the defendant improperly conflates what is relevant evidence and what is cumulative evidence.

The victim's forensic interview was highly probative with respect to the defendant's conduct during the incident in which he made contact with her vagina and anus.[10] The defendant was charged with two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1). One count was premised on the allegation that the defendant forcibly engaged in penile-vaginal intercourse with the victim, and one count was premised on the allegation that the defendant forcibly engaged in penile-anal intercourse with the victim.

Section 53a-70 (a) provides in relevant part: "A person is guilty of sexual assault in the first degree when such person (1) compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person . . . ." "'Sexual intercourse' means vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient

[10] See footnote 7 of this opinion.

to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body." General Statutes § 53a-65 (2). The victim's statement in the forensic interview that she felt something "inside" of her vagina and anus made it more likely that penetration of the vagina and anus had occurred.

Moreover, the state charged the defendant with risk of injury to a child in violation of § 53-21 (a), which provides in relevant part: "Any person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . (B) a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court." This charged offense required the state to prove not only that intimate contact with the victim's intimate parts occurred but that it occurred in a sexual and indecent manner likely to impair the health or morals of the victim. The victim's forensic interview provided additional insight into the manner in which the intimate contact with her private parts occurred, specifically, her belief that she felt "[a] man's private" make contact with her private parts. This additional detail made it more likely that the defendant used his penis during the incident. This, in turn, made it more likely that the intimate contact not only occurred in a sexual and indecent manner but that it was likely to impair the victim's health or morals. Accordingly, we are not

persuaded that the evidence was irrelevant or that it should have been excluded because it was cumulative. Indeed, we conclude that the evidence was highly probative.

Having discussed the considerable probative value of the video of the forensic interview, we now consider the defendant's argument that its probative value was outweighed by the risk of undue prejudice to the defense. The defendant posits that the danger of prejudice arose from the fact that the video improperly bolstered the victim's testimony because it essentially constituted constancy of accusation evidence, the video placed an undue emphasis on her testimony, and the video unduly aroused the jurors' sympathy for the victim. We disagree with these contentions.

The defendant's attempt, for the first time on appeal, to recast the video as constancy of accusation evidence is unavailing. The state did not offer the video as constancy of accusation evidence. The state argued that the video was admissible under the medical diagnosis and treatment exception to the rule against hearsay; see Conn. Code Evid. § 8-3 (5); and because it provided additional details to the manner in which the contact at issue occurred. The defendant agreed at trial, and does not dispute on appeal, that the video fell within the hearsay exception. The evidence consisted of the victim's own statements to a medical provider, not the statements of multiple third parties to whom she disclosed abuse. The court admitted the video without limitation. Thus, it was admitted for substantive purposes instead of merely being corroborative of the credibility of the victim, which is the sole proper use of constancy of accusation testimony. See, e.g., *State* v. *Daniel W. E.*, 322 Conn. 593, 612–13, 142 A.3d 265 (2016) (discussing limited purpose for which constancy of accusation testimony should be considered).

Moreover, the defendant did not suggest, as he does on appeal, that the videotaped forensic interview, which occurred in March, 2016, was generated merely to prepare the victim for the trial that occurred more than two years later. The defendant's suggestion that the interview was essentially manufactured by the prosecutor for use at trial lacks any factual basis. The forensic interview was conducted by a clinical social worker, and the video did not contain the opinions of expert witnesses about the victim's credibility or statements of third parties to whom the victim disclosed abuse.[11] We are not persuaded that the video unfairly bolstered the victim's credibility.

Next, the defendant argues that the video was unduly prejudicial in that it placed an improper emphasis on the victim's testimony by permitting the victim to testify twice, once as a witness and once by means of the video. The defendant relies on *State* v. *Gould*, 241 Conn. 1, 9–15, 695 A.2d 1022 (1997), in which the state was permitted to present at trial the videotaped testimony of a state's witness, who, for health reasons, could not be present in court to testify. Id., 10. During the jury's deliberations, it requested to view the videotaped testimony in the jury room. Id., 11. The court granted the request. Id. On appeal, the defendants in *Gould* claimed that it was improper for the court to have granted the request to replay the videotaped testimony in the jury room, outside of the court's supervision, and that they

[11] The defendant argues that, in the video, Vidro Madigan enhanced the victim's credibility because she indicated to the victim that she believed her allegations. Although, in the video, Vidro Madigan made statements to the victim that could be interpreted as expressions of belief in the victim's statements, we are not persuaded that the jury would have interpreted such statements accordingly. During her testimony, Vidro Madigan explained the techniques that she used in conducting a forensic interview, which included building a rapport with the children she interviewed and making them comfortable so that they can answer questions in a narrative style. Vidro Madigan testified, however, that making a determination as to whether or not the child has made truthful statements was not a part of her job.

were prejudiced by the court's ruling because it "unduly emphasized" the witness' testimony, essentially permitting the witness to testify twice. Id., 12.

Our Supreme Court rejected the argument that the rules of practice prohibited the trial court from permitting the replay of the videotaped testimony in the jury room. See id. The court determined that the ruling did not reflect an abuse of the trial court's discretion because "the most reliable means for the jury to review [the witness'] testimony was to view the videotape." Id., 13. Our Supreme Court, however, exercised its supervisory authority over the administration of justice to require that, "[w]here a court decides, pursuant to that court's sound discretion, that the jury should be permitted to replay videotaped deposition testimony, it must be done in open court under the supervision of the trial judge and in the presence of the parties and their counsel." Id., 15. Our Supreme Court, in concluding that the ruling was not improper, nonetheless noted that the defendants had raised valid concerns that might have existed in other cases in which a danger existed that a jury might have given undue weight to the videotaped testimony of a witness over that witness' in-court testimony. See id., 14.[12]

The court's concern in *Gould* centered on the jury's unsupervised use of videotaped testimony during its deliberations. The court, in the exercise of its supervisory authority, did not prohibit the admission of videotaped forensic interviews. It required that, when a trial court permits a jury to replay videotaped deposition testimony, it must be done in open court under the

[12] The court in *Gould*, having exercised its supervisory authority, also noted that "[the witness] was not the victim of the crimes in this case and her videotaped testimony, which we have reviewed, does not engender the passion, animation or sympathy presented in the videotapes of child victims of sexual abuse." *State* v. *Gould*, supra, 241 Conn. 14. Although the defendant relies on this small portion of the court's analysis, we do not interpret it to be integral to its holding in *Gould* or a rule of admissibility.

supervision of the trial judge and in the presence of the parties and their counsel. Id., 15. The defendant's claim in the present case concerns the admissibility of the videotaped forensic interview; the defendant has not raised a claim of error related to the jury's unsupervised use of the videotaped forensic interview in the jury room. Thus, we are not persuaded that *Gould* supports his claim of undue prejudice.

Finally, the defendant argues that the video was unduly prejudicial because it generated sympathy for the victim. Specifically, the defendant claims that statements made by Vidro Madigan during her questioning of the victim engendered feelings of sympathy for the victim because Vidro Madigan expressed feelings of empathy to the victim. Vidro Madigan testified that her duties as a clinical social worker did not include making a determination as to the credibility of the victim's allegations. See footnote 11 of this opinion. Thus, it is likely that the jury would have interpreted any statements that suggested empathy to have reflected Vidro Madigan's effort to build a rapport with the victim during the interview, not a genuine belief by Vidro Madigan that the victim was being truthful or a belief that she had actually suffered any abuse at the hands of the defendant.

The defendant also relies on the fact that the video depicted the victim, aged twelve, discussing the details of her allegations of sexual abuse with "a stranger," and that the victim made some comments in the video, but not in her live testimony, that would have generated sympathy for her. These comments by the victim included a description of a picture that she drew of a flower that represented her and her mother, multiple references to the defendant having "forced [her] to have sex with him," and an expressed preference in favor of living with her grandmother because her grandmother did not beat her.

At the time of trial, the victim was fourteen years of age and in the eighth grade. The victim was examined and cross-examined at length in open court about the allegations of sexual abuse. We are not persuaded that the mere fact that she discussed her allegations at age twelve with Vidro Madigan was likely to cause any additional feelings of sympathy in the eyes of the jurors than would the fact that she endured testifying at trial. Moreover, we recognize that the victim's statements to Vidro Madigan at age twelve were not identical to her trial testimony. To the extent that she used different language at the trial, however, to describe the allegations and her relationship with the defendant, the statements were not so different in nature that they were likely to engender strong feelings of sympathy over those that may have been engendered by the victim's trial testimony.

"To be unfairly prejudicial, evidence must be likely to cause *a disproportionate emotional response in the* [*jurors*], thereby threatening to overwhelm [*their*] neutrality and rationality to the detriment of the opposing party. . . . A mere adverse effect on the party opposing admission of the evidence is insufficient. . . . Evidence is prejudicial when it tends to have some adverse effect [on] a defendant beyond tending to prove the fact or issue that justified its admission into evidence." (Emphasis added; internal quotation marks omitted.) *State* v. *Miguel C.*, 305 Conn. 562, 575–76, 46 A.3d 126 (2012). In substance, the victim, in her trial testimony and during her forensic interview, described the fact that she made a drawing depicting her and her mother, the fact that the defendant forced her to submit to the sexual contact that occurred in her bedroom, and the fact that the defendant beat her. Thus, the video did not introduce facts that were of a materially different nature than those introduced during the trial, and, thus,

we are not persuaded that the differences in facts, to the extent they existed, unduly prejudiced the defendant.

For the foregoing reasons, we conclude that the court's admission of the videotaped forensic interview of the victim did not reflect an abuse of its discretion.

III

Next, the defendant claims that the trial court violated his rights to due process, to a fair and impartial trial, and to be convicted by means of a unanimous verdict because the deadlocked jury instructions the court provided to the jury were coercive and misleading. We disagree.

The following additional facts are relevant to this claim. The jury deliberated over the course of four days. On the third day of jury deliberations, the jury sent the court a note, stating: "At this time, the jury is not unanimous on any of the three charges. It does not appear this will change with additional deliberation time." Outside of the jury's presence, the court discussed the note with counsel. The court noted that it was prepared to deliver to the jury deadlocked jury instructions, also known as "Chip Smith" instructions.[13] The court stated that it would use the model jury instructions on the Judicial Branch website that pertain to deadlocked juries. See Connecticut Criminal Jury Instructions 2.10-4, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited December 21, 2021). Defense counsel submitted a written request that the court instruct the jury with *some* of the language from the instructions found on the Judicial Branch website but with added language at the beginning of the instructions to clarify that *the jury need not reach a*

[13] A "Chip Smith" charge provides guidance to a deadlocked jury in reaching a verdict. See, e.g., *State* v. *O'Neil*, 261 Conn. 49, 74–75, 801 A.2d 730 (2002).

verdict. The language in the first paragraph of the defendant's requested instructions forms the basis of the present claim.[14] Defense counsel addressed the court, noting that, if a unanimous verdict was not possible, the jury should be informed that its failure to reach a verdict was "a perfectly proper outcome." The court noted that it had considered the defendant's request but that it would deliver the model instructions from the Judicial Branch website.[15] After the court delivered

[14] The defendant requested the following instruction: "Ladies and gentlemen, I have received your note and will now have some further instructions for you at this time. At the outset, let me make it clear to you that it is not the purpose of these instructions to require or even suggest that you reach a verdict in this case. I in no way wish to suggest or imply that a verdict should or could be reached in this case; in fact, our legal system recognizes the right of jurors not to agree. I do think, however, that the following instructions may be of aid to you if, in fact, a verdict can be reached.

"The verdict to which each of you agrees must express your own conclusion and not merely the acquiescence on the conclusion of your fellow jurors. Yet, in order to bring your minds to a unanimous result, you should consider the question you have to decide not only carefully but also with due regard and deference to the opinions of each other.

"In conferring together, you ought to pay proper respect to each other's opinions and listen with an open mind to each other's arguments. If the much greater number of you reach a certain conclusion, dissenting jurors should consider whether their opinion is a reasonable one when the evidence does not lend itself to a similar result in the minds of so many of you who are equally honest and equally intelligent, who have heard the same evidence with an equal desire to arrive at the truth and under the sanctions of the same oath.

"But please remember this: Do not ever change your mind just because other jurors see things differently or to get the case over with. As I told you before, in the end, your vote must be exactly that—your own vote. As important as it may be for you to reach a unanimous agreement, it is just as important that you do so honestly and in good conscience.

"I now ask you to resume your deliberations with these instructions in mind." (Emphasis in original.)

[15] The court instructed the jury as follows: "Ladies and gentlemen, I'm now going to give you an additional charge, and this charge is when the jury fails to agree. And here is the charge. The instruction[s] that I shall give you now are only to provide you with additional information so that you may return to your deliberations and see whether you can arrive at a verdict. Along these lines, I would like to state the following to you:

"The verdict to which each of you agree must express your own conclusion and not merely acquiesce in the conclusion of your fellow jurors, yet in order to bring your minds to [a] unanimous result, you should consider the

its instructions, defense counsel reiterated that the defendant not only objected to the court's failure to instruct the jury in accordance with the first paragraph of his requested instructions but that the defendant also objected to the last paragraph of the court's instructions. Defense counsel argued that the last paragraph of the court's instructions suggested that the jury *should* agree on a verdict, and, thus, it was unduly coercive in nature. The court noted the objection. The following day, the jury returned a verdict. At the defendant's request, each member of the jury was individually polled, and each juror indicated that he or she agreed with the verdict.

On appeal, the defendant argues that, "[u]nlike the standard instruction [delivered by the court], the proposed instruction made it clear the jurors had the right not to agree and that the court was not suggesting a verdict had to be reached. Under the circumstances of this case, where, after three days of deliberating the jurors indicated further deliberations would not be fruitful, the verdict was the result of an impermissibly coercive and misleading instruction." The defendant acknowledges that the instruction that the court delivered to

question you have to decide, not only carefully, but also with due regard and deference to the opinions of each other.

"In conferring together, you ought to pay proper respect to each other's opinions and listen with an open mind to each other's arguments. If the much greater number of you reach a certain conclusion, dissenting jurors should consider whether their opinion is a reasonable one when the evidence does not lend itself to a similar result in the minds of so many of you who are equally honest and equally intelligent, who have heard the same evidence with an equal desire to arrive at the truth, and under the sanction of the same oath.

"But please remember this, do not ever change your mind just because other jurors see things differently or to get the case over with. As I told you before, in the end, your vote must be exactly that, your own vote. As important as it is for you to reach a unanimous agreement, it is just as important that you do so honestly and in good conscience.

"What I have said to you is not intended to rush you into agreeing on a verdict. Take as much time as you need to discuss this matter. There is no hurry. So with that, you will continue your deliberations. Thank you."

the jury has survived prior judicial scrutiny yet asserts that "there was no reason for the court to reject [his] proposed instruction, which was a more balanced instruction that accurately stated the law." The defendant argues that, because the possibility of a hung jury is a consequence of the unanimity requirement, a court sends the wrong message when it suggests that the jury's inability to reach a verdict is not an acceptable outcome of its deliberations. The defendant argues that "the court's instructions misled the jurors by giving them the unwarranted impression that a verdict was required. . . . [T]he court's instructions simply told them *how* they should continue to deliberate in order to arrive at a verdict, and not that it was permissible for them not to deliver a verdict." (Emphasis in original.)

The defendant adequately preserved his claim that the court's instructions were impermissibly coercive. Because this presents an issue of law, we review the instructions under a plenary standard of review. See, e.g., *State* v. *Carrasquillo*, 191 Conn. App. 665, 680, 216 A.3d 782, cert. denied, 333 Conn. 930, 218 A.3d 69 (2019).

"The possibility of disagreement by the jury is implicit in the requirement of an unanimous verdict and is part of the constitutional safeguard of trial by jury." (Internal quotation marks omitted.) *State* v. *Stankowski*, 184 Conn. 121, 147, 439 A.2d 918, cert. denied, 454 U.S. 1052, 102 S. Ct. 596, 70 L. Ed. 2d 588 (1981). We are mindful that "[a] jury that is coerced in its deliberations deprives the defendant of his right to a fair trial under the sixth and fourteenth amendments to the federal constitution, and article first, § 8, of the state constitution. Whether a jury [was] coerced by statements of the trial judge is to be determined by an examination of the record. . . . The question is whether in the context and under the circumstances in which the statements were made, the jury [was], actually, or even probably, misled or coerced . . . . *We recognize that a defendant is not entitled to*

an instruction that a jury may hang . . . [but] he is entitled to a jury unfettered by an order to decide." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Carrasquillo*, supra, 191 Conn. App. 680. Stated otherwise, in evaluating whether coercion occurred, we do not merely examine the content of the court's instructions but "the context and . . . circumstances in which they were given . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Daley*, 161 Conn. App. 861, 878, 129 A.3d 190 (2015), cert. denied, 320 Conn. 919, 132 A.3d 1093 (2016).

"It is well settled that a Chip Smith charge is an acceptable method of assisting the jury to achieve unanimity. . . . The purpose of the instruction is to prevent a hung jury by urging the jurors to attempt to reach agreement. It is a settled part of Connecticut jurisprudence . . . . Better than any other statement . . . it makes clear the necessity, on the one hand, of unanimity among the jurors in any verdict, and on the other hand the duty of careful consideration by each juror of the views and opinions of each of his fellow jurors . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Feliciano*, 256 Conn. 429, 439, 778 A.2d 812 (2001). "The language of the charge does not direct a verdict, but encourages it." Id., 440.

The trial court's instructions mirrored the deadlocked jury instructions crafted by our Supreme Court in *State* v. *O'Neil*, 261 Conn. 49, 74–75, 801 A.2d 730 (2002). Our Supreme Court affirmed the instructions "as an acceptable method of encouraging a deadlocked jury to reach a verdict." Id., 75. As the defendant correctly observes, the use of the deadlocked jury instruction set forth in *O'Neil* has been upheld in numerous appellate decisions. In the present case, the defendant asked the court to instruct the jury that it "in no way wish[ed] to suggest or imply *that a verdict should or could be reached in this case* . . . ." (Emphasis added.) See

footnote 14 of this opinion. This requested instruction condoned a hung jury. Both this court and our Supreme Court have expressly stated that a defendant is not entitled to an instruction of this nature. See, e.g., *State* v. *Breton*, 235 Conn. 206, 239, 663 A.2d 1026 (1995); *State* v. *Peary*, 176 Conn. 170, 184, 405 A.2d 626 (1978), cert. denied, 441 U.S. 966, 99 S. Ct. 2417, 60 L. Ed. 2d 1072 (1979); *State* v. *Ralls*, 167 Conn. 408, 421, 356 A.2d 147 (1974), overruled on other grounds by *State* v. *Rutan*, 194 Conn. 438, 479 A.2d 1209 (1984); *State* v. *Carrasquillo*, supra, 191 Conn. App. 680; *State* v. *Spyke*, 68 Conn. App. 97, 116, 792 A.2d 93, cert. denied, 261 Conn. 909, 804 A.2d 214 (2002). We reject the defendant's invitation to conclude that the model instructions used in the present case were not an acceptable method of encouraging a deadlocked jury to reach a verdict. As an intermediate court of appeal, we are unable to overrule, reevaluate, or reexamine the propriety of the instruction that has been bestowed by our Supreme Court. See *State* v. *Carrasquillo*, supra, 683.

Moreover, setting aside the *content* of the court's instructions, contrary to the defendant's arguments, there is nothing concerning the *context and circumstances* in which the court delivered its deadlocked jury instructions that leads us to conclude that the use of the instructions in the present case was coercive. The defendant focuses on the fact that, when the jury sent the note to the court, it had already deliberated over the course of three days. During these three days, the jury had requested playback of the victim's forensic interview, the victim's testimony, and B's testimony. As noted previously in this opinion, in its note, the jury expressed its belief that additional deliberation time would not lead to a unanimous verdict. The fact that the jury had engaged in deliberations and requested playback of some of the testimony and evidence prior to sending the note merely reflected, at most, that the

jury was fulfilling its duty of carefully considering the evidence. The jury's note, the first and only time that it communicated with the court with respect to an impasse, and the jury's belief that additional deliberation time would not be fruitful, did not make the court's instructions coercive. The note did not refer to hostility among jurors, any indication that jurors had not followed their juror oaths, or any indication that one or more jurors would not continue to follow their juror oaths following additional instruction. Nothing in the context or circumstances made the instructions coercive. Stated otherwise, the defendant has not drawn a meaningful distinction between the circumstances of the present case and any other case in which a jury had expressed its belief that it was unable to reach a unanimous verdict, thereby prompting the court to deliver deadlocked jury instructions.[16]

Finally, we address the defendant's argument that, "[i]ndeed, the split verdict, which cannot be reconciled with the evidence, signifies there was coercion and that the jurors rendered a compromise verdict because they felt they had no other choice but to agree." Setting aside the issue of whether the split verdict may be reconciled with the evidence, the defendant's attempt to use the split verdict as evidence of coercion is unavailing. As this court has observed, "in the context of a coerciveness claim, a verdict of not guilty with respect to one or more counts does not necessarily shed light on the source of the jury's disagreement or whether the verdict of one or more jurors was the result of coercion rather than conscience." *State* v. *Carrasquillo*, supra, 191 Conn. App. 689–90 n.12.

[16] The defendant also argues that the fact that the jury reached a verdict following the court's instructions "indicates the instruction coerced a verdict." Thus, the defendant appears to suggest that any verdict that follows deadlocked jury instructions ipso facto is the product of coercion.

For the foregoing reasons, we are not persuaded that the court's deadlocked jury instructions were coercive. Thus, the defendant has failed to establish the basis for his claim that the court violated his rights to due process, to a fair and impartial trial, and to be convicted by means of a unanimous verdict.

IV

Finally, the defendant claims that this court, in the exercise of its supervisory authority over the administration of justice, should require trial courts, when delivering deadlocked jury instructions, to instruct the jury that it need not reach a verdict and that jurors have the right to disagree with respect to the proper verdict. We decline to exercise our supervisory authority.

Consistent with the defendant's third claim, he argues that the specific language he sought in his requested instructions is "warranted to protect the defendant's due process rights and right of trial by jury, and to ensure that the jury is not coerced into reaching a verdict." According to the defendant, "[b]ecause the purpose of giving a Chip Smith instruction is to urge jurors to return a verdict . . . there ought to be some language, similar to what [he] proposed, to cure the unevenness of the instruction." (Citation omitted.) The defendant argues that the well established instructions used by the court in the present case did not "avoid the problem of jurors feeling that they must abandon their beliefs because a verdict is required."

The defendant argues that the court's instructions gave precedence to the state's right to obtain a verdict over his right not to be convicted of a crime in the absence of proof beyond a reasonable doubt. The defendant argues that the need for change in the deadlocked jury instructions is demonstrated by the fact that the jury, having represented that it was deadlocked, returned a verdict in the present case after the court

delivered the instructions. He also argues that the jury's verdict represented a "paradoxical split verdict [that] can only be the result of the coercive instruction given by the court."[17]

"It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Indeed, there is no principle that would bar us from exercising our supervisory authority to craft a remedy that might extend beyond the constitutional minimum because articulating a rule of policy and reversing a conviction under our supervisory powers is perfectly in line with the general principle that this court ordinarily invoke[s] [its] supervisory powers to enunciate a rule that is not constitutionally required but that [it] think[s] is preferable as a matter of policy." (Citations omitted; internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 764–65, 91 A.3d 862 (2014).

We decline to exercise our supervisory authority in the present case. In *State* v. *O'Neil*, supra, 261 Conn.

[17] The defendant also refers to model jury instructions in other jurisdictions that, in his view, comport with the language in his requested instructions and make clear that the jury has a right not to agree on a unanimous verdict.

74–75, our Supreme Court, in the exercise of its supervisory authority, crafted the deadlocked jury instructions that have become Connecticut's model instructions and were delivered by the court in the present case. Our Supreme Court exercised its supervisory authority because "jurors should be reminded not to acquiesce in the conclusion of their fellow jurors merely for the sake of arriving at a unanimous verdict." Id., 74. Our Supreme Court explained that it did "not find the language directed at minority view jurors unduly coercive, especially in light of the balancing language reminding jurors not to abandon their conscientiously held beliefs. On the contrary, we believe that the version of the charge that we adopt today for our trial courts most appropriately balances the systemic interest in a unanimous verdict and the defendant's right to have each and every juror vote his or her conscience irrespective of whether such vote results in a hung jury." Id., 75–76. Because our Supreme Court has explicitly addressed the issue of what instructions are proper, it would be inappropriate for this court to overrule, reevaluate, or reexamine the propriety of the instructions. See *State* v. *Carrasquillo*, supra, 191 Conn. App. 683.

The judgment is affirmed.

In this opinion the other judges concurred.

OCWEN LOAN SERVICING, LLC *v.* MICHAEL A. MORDECAI ET AL.
(AC 43295)

Prescott, Alexander and Suarez, Js.

Syllabus

In 2011, the plaintiff, O Co., sought to foreclose a mortgage on certain real property owned by the defendants, and thereafter filed a motion to substitute N Co. as the plaintiff. In 2017, N Co. filed a motion for summary judgment as to liability only as to its amended complaint. Soon thereafter, N Co. assigned the mortgage to W Co., and filed a motion to substitute W Co. as the plaintiff, which the court granted. For several months, the parties engaged in discovery and litigated discovery disputes, including W Co.'s inability to locate and produce loan payment history records for a period of more than two years. While discovery objections were still outstanding, W Co. reclaimed the motion for summary judgment in 2018. Subsequently, the trial court ordered W Co. to provide additional discovery regarding its search efforts to locate the missing loan payment records. After the completion of discovery, the defendants filed a request to amend their answer and special defenses, which contained seven special defenses to address the incomplete payment records and related issues regarding changes in the amount of escrow payments. The defendants also submitted a caseflow request for a continuance to respond to W Co.'s motion for summary judgment until after the court ruled on their request to amend, arguing, in relevant part, that the amended special defenses, if granted, would have direct significance on the motion for summary judgment, and, therefore, should be considered first. The court, however, denied the requested continuance. W Co. filed an objection to the defendants' request to amend, claiming that the defendants' counsel sought to delay the case, which the court sustained, and thereafter denied the defendants' request to amend without explanation or analysis. In 2019, W Co. filed a reply to the defendants' original special defenses and a certificate of closed pleadings. The court granted W Co.'s motion for summary judgment, finding that no genuine issues of material fact existed as to liability on the note and mortgage, but provided no legal analysis. Thereafter, the court rendered a judgment of strict foreclosure in favor of W Co., from which the defendants appealed to this court. *Held* that the trial court's denial of the defendants' request to amend their answer and special defenses constituted an abuse of discretion: the court failed to provide a sound reason for denying the defendants' request as the granting of the amendment would not have unduly delayed trial or unfairly prejudiced W Co. in light of the facts that the proposed amendment was filed prior to W Co.'s certificate of closed pleadings, the motion for summary judgment had languished on

the docket for a significant period of time without being claimed for a hearing by W Co., and no trial date had been scheduled; moreover, it was appropriate procedurally and as a matter of legal strategy for the defendants to wait until discovery was completed as the missing information could have been relevant to the defendants' theory of defense where such discovery related to the amount of the debt owed and the issue of default; furthermore, although the case had been pending for a significant period of time, some of that delay was attributable to W Co. or to its predecessors in interest and nothing in the record supported a finding that the defendants engaged in unreasonable or purely dilatory behavior in defending the foreclosure action; additionally, the defendants sought to have the trial court articulate the factual and/or legal basis for its decision to disallow the amendment but were thwarted in their efforts by the unavailability of the trial judge; accordingly, the trial court's error in failing to allow the defendants to amend their answer and special defenses required the reversal of the court's granting of the motion for summary judgment as to liability and the judgment of strict foreclosure because such judgment was rendered in part on the summary determination of liability.

Argued September 16—officially released December 28, 2021

Procedural History

Action to foreclose a mortgage on certain real property of the defendants, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where Wilmington Savings Fund Society, F.S.B., was substituted as the plaintiff; thereafter, the court, *Bruno*, *J.*, denied the defendants' request to amend their answer and special defenses; subsequently, the court, *Bruno*, *J.*, granted the substitute plaintiff's motion for summary judgment as to liability only; thereafter, the court, *Bruno*, *J.*, rendered judgment of strict foreclosure, from which the defendants appealed to this court. *Reversed; further proceedings.*

Jeremy E. Baver, for the appellants (defendants).

Christopher J. Picard, for the appellee (plaintiff).

Opinion

PRESCOTT, J. The defendants, Michael A. Mordecai and Elizabeth M. Keyser, appeal from the judgment of

strict foreclosure rendered by the trial court in favor of the substitute plaintiff Wilmington Savings Fund Society, F.S.B., D/B/A Christiana Trust, not individually but as trustee for Pretium Mortgage Acquisition Trust (Wilmington).[1] The defendants claim that the court (1) abused its discretion by denying their request to amend their special defenses, (2) improperly granted summary judgment as to liability because a genuine issue of material fact existed regarding whether they had defaulted on the note, and (3) misapplied Practice Book § 23-18 (a)[2] in rendering a judgment of strict foreclosure because they had asserted a defense regarding the amount of the debt owed. We agree with the defendants that the court abused its discretion by not allowing them to amend their special defenses and, consequently, also improperly granted the motion for summary judgment as to liability and rendered a judgment of strict foreclosure without due consideration of those defenses.[3] Accordingly, we reverse the judgment of the court and remand for further proceedings consistent with this opinion.

The record reveals the following relevant undisputed facts and procedural history. In 2007, the defendants

[1] The original plaintiff, Ocwen Loan Servicing, LLC, assigned the subject mortgage deed to Nationstar Mortgage, LLC (Nationstar). Nationstar later was substituted as the plaintiff. Nationstar subsequently assigned the mortgage to Wilmington, which was substituted as the plaintiff for Nationstar. In this opinion, for clarity purposes, we refer to the original plaintiff and the substitute plaintiffs by name.

[2] Practice Book § 23-18 (a) provides: "In any action to foreclose a mortgage *where no defense as to the amount of the mortgage debt is interposed*, such debt may be proved by presenting to the judicial authority the original note and mortgage, together with the affidavit of the plaintiff or other person familiar with the indebtedness, stating what amount, including interest to the date of the hearing, is due, and that there is no setoff or counterclaim thereto." (Emphasis added.)

[3] Because we reverse the granting of the motion for summary judgment as to liability and the resulting judgment of strict foreclosure on the ground that the court improperly failed to allow the defendants to amend their special defenses, it is unnecessary to reach the other claims of error raised by the defendants.

purchased residential property in Fairfield. They executed a promissory note in favor of Taylor, Bean & Whitaker Mortgage Corporation (TB&W) in the principal amount of $340,000 (note). As security for the note, the defendants executed a mortgage on the Fairfield property in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for TB&W (mortgage).[4] TB&W later endorsed the note in blank.

In August, 2011, Ocwen Loan Servicing, LLC (Ocwen), as successor in interest to TB&W, commenced the underlying mortgage foreclosure action. In its complaint, Ocwen alleged that the mortgage had been "assigned to [it] by virtue of an assignment of mortgage," and that it was "the holder of [the] note and mortgage." Ocwen further alleged that the note was in default and that it had elected to accelerate the balance due on the note, declare the note due in full, and foreclose the mortgage securing the note.

For more than four years, the parties participated in court-sponsored foreclosure mediation.[5] The defendants, however, were unable to obtain a loan modification, and the mediation was terminated by order of the court on January 22, 2016.

[4] "MERS acts as the nominal mortgagee for the loans owned by its members . . . which include originators, lenders, servicers, and investors . . . . [If a] member transfers an interest in a mortgage loan to another MERS member, MERS privately tracks the assignment within its system but remains the mortgagee of record. According to MERS, this system saves lenders time and money, and reduces paperwork, by eliminating the need to prepare and record assignments when trading loans. . . . If, on the other hand, a MERS member transfers an interest in a mortgage loan to a non-MERS member, MERS no longer acts as the mortgagee of record and an assignment of the security instrument to the non-MERS member is drafted, executed, and typically recorded in the local land recording office." (Internal quotation marks omitted.) *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 122 n.1, 74 A.3d 1225 (2013).

[5] During the pendency of mediation, "[a] litigation hold is placed on the case, during which time a mortgagee is prohibited from making any motion, request or demand of a mortgagor, except as it may relate to the mediation program; General Statutes § 49-31*l* (c) (6); and no judgment of strict foreclosure or foreclosure by sale may be rendered against the mortgagor during

On April 11, 2016, Ocwen filed a motion to default the defendants for failure to plead. It also filed a demand for a disclosure of defenses. The clerk initially granted the motion for default. That same day, however, the defendants filed a disclosure of defenses and a request to revise the complaint. As a result, the clerk vacated the default against the defendants. One of the revisions sought by the defendants was for Ocwen to provide more factual details regarding its allegation that it currently was the holder of the note. Ocwen filed an objection, which the court sustained.

Soon thereafter, however, Ocwen filed a motion to substitute Nationstar Mortgage, LLC (Nationstar), as the plaintiff. Ocwen stated in its motion that it had assigned the subject mortgage deed and note to Nationstar. Attached to the motion to substitute was a copy of a page from the Fairfield land records showing that an assignment of mortgage from Ocwen to Nationstar had been executed on October 29, 2013, and subsequently recorded on November 18, 2013.[6] The defendants objected to the substitution, arguing, inter alia, that the assignment only referred to the mortgage and not the note. Further, the defendants argued that, in objecting to their request to revise, Ocwen had made admissions to the court about its own status as the holder of the note and that it had the right to enforce the mortgage that appeared to conflict with the assignment attached to the motion to substitute. The court sustained the defendants' objection and denied the motion to substitute, stating: "There is no indication that Nationstar is the holder or owner of the note."

the mediation period. General Statutes §§ 49-31*l* (c) (6) and 49-31n (c) (9)." *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 677–78 n.17, 212 A.3d 226 (2019).

[6] Ocwen's motion to substitute suggests that the defendants' earlier attempt to obtain revisions regarding the identity of the holder of the note was more than appropriate.

On October 26, 2016, Ocwen filed a motion for judgment of strict foreclosure and a preliminary statement of the debt calculated as of October 5, 2016. According to that statement, the principal and accrued interest on the note totaled $481,708.53. Ocwen simultaneously filed an appraisal that indicated that the fair market value of the subject property was $430,000. Ocwen also filed a second motion to default the defendants for failure to plead.

The clerk denied the motion for default, noting that, on November 1, 2016, the defendants filed a motion to strike the foreclosure complaint. In their motion to strike, the defendants argued, in relevant part, that the complaint failed to state a cause of action for foreclosure because Ocwen had failed to adequately plead regarding its status as the holder of the note or to identify the precise nature of the alleged default. Ocwen filed an opposition to the motion to strike and also renewed its motion to substitute Nationstar as the plaintiff. The renewed motion to substitute contained a representation that Nationstar, through its counsel, was in possession of the note, which was endorsed in blank, and, thus, Nationstar was the current holder of the note.

On January 5, 2017, the court granted the defendants' motion to strike the foreclosure complaint, agreeing with the defendants that the original complaint lacked sufficient allegations regarding "prima facie elements of a cause of action for foreclosure of a mortgage . . . ." The court also granted Ocwen's motion to substitute Nationstar as the plaintiff by virtue of Ocwen's allegation that it had assigned the subject mortgage to Nationstar on October 29, 2013, and that Nationstar, through its counsel, was in possession of the note endorsed in blank. Nationstar then filed an amended complaint on January 11, 2017, which is the operative complaint in this action.

The defendants filed a timely answer to the amended complaint on February 2, 2017. The defendants also asserted four special defenses at that time.[7]

On June 22, 2017, Nationstar filed a motion for summary judgment as to liability only. On July 6, 2017, the defendants filed a motion to dismiss the foreclosure action in which they argued that the court lacked subject matter jurisdiction because Nationstar was neither the owner of the debt nor the holder of the note. Nationstar sought and was granted an extension of time to respond to the motion to dismiss, following which, on August 22, 2017, it filed a motion to substitute Wilmington as the plaintiff, stating that it had assigned the subject mortgage to Wilmington, which currently was in possession of the note. A copy of the assignment of mortgage from Nationstar to Wilmington was attached and showed that the assignment had been executed on July 6, 2017, the day the defendants filed their motion to dismiss.

The court granted the motion to substitute Wilmington as the plaintiff on September 14, 2017. On January 21, 2018, the court denied the defendants' motion to dismiss. Over the next several months, the parties exchanged discovery and litigated several discovery disputes. The parties argued their outstanding discovery disputes to the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, on May 29, 2018, which issued a ruling on September 23, 2018. Among the issues to be resolved was Wilmington's inability to locate and produce loan

[7] The first special defense asserted unclean hands premised on Nationstar or intervening holders of the note having knowingly presented false documents to the court. The second special defense asserted that the defendants previously had paid off the note in full to a prior holder or Nationstar had "received payments sufficient to pay off the entire alleged outstanding balance." The third special defense asserted that the note was endorsed with an unauthorized signature. Finally, the fourth special defense alleged that Nationstar lacked standing to prosecute the foreclosure action.

payment history records for a period of more than two years starting from the loan origination date through August 19, 2009. Judge Jennings stated in his discovery ruling that the defendants have provided a payment history that "admittedly has a gap or gaps," and that Wilmington "is unable to find payment history records for the gap period(s)." In relevant part, the court ordered Wilmington to provide the defendants with additional discovery regarding its search efforts to locate the missing loan payment records.

On December 26, 2018, following the completion of discovery, the defendants filed a request to amend their answer and special defenses. The attached proposed amended pleading contained seven special defenses, the primary basis of which were to address the incomplete payment records and related issues regarding changes in the amount of escrow payments. The first and second amended special defenses alleged unclean hands, asserting generally that Wilmington and its predecessors in interest knew about the incomplete payment history, and that the amount of the claimed debt was inaccurate, which unduly prejudiced the defendants both during mediation and in defending against the foreclosure action. The third special defense asserted that the defendants had not been given proper notice of the alleged default or other requisite statutory notice requirements. The fourth special defense sounded in payment pursuant to General Statutes § 42a-3-602 and alleged that the defendants "were current on the correctly calculated mortgage payment amounts." The fifth special defense alleged a failure to comply with regulations promulgated under the federal Real Estate Settlement Procedures Act of 1974 (RESPA), in particular 12 C.F.R. § 1024.38, which requires loan servicers to provide borrowers with accurate and current information regarding a borrower's mortgage loan. The sixth special defense sounded in fraud. The seventh

special defense asserted, inter alia, that the note was endorsed in blank by someone "not authorized to endorse the instrument."

The defendants also filed a separate caseflow request that sought a continuance to respond to and argue the motion for summary judgment as to liability until after the court had ruled on their request to amend their special defenses. Judge Jennings issued an order on December 28, 2018, denying the requested continuance. The court explained that, unless an objection to a request to amend is filed within fifteen days, it is deemed granted by consent; see Practice Book § 10-60 (a) (3); and no such objection had been filed. The court ordered the parties to appear on January 2, 2019, as previously scheduled, "with a timetable for hearing the motion for summary judgment, which has been pending for more than eighteen months." Wilmington thereafter filed an objection to the defendants' request to amend their special defenses.

On January 7, 2019, the court ordered the defendants to file any opposition to the motion for summary judgment within fourteen days of the court's ruling on the objection to their request to amend, which was scheduled for a hearing on January 22, 2019. Following that hearing, on January 30, 2019, the court, *Bruno*, *J.*, denied the defendants' request to amend their special defenses without any explanation or analysis. Wilmington filed a reply to the defendants' original special defenses on February 1, 2019, denying all allegations therein. The same day, Wilmington filed a certificate of closed pleadings.

On February 13, 2019, the defendants filed their memorandum in opposition to the motion for summary judgment. Wilmington thereafter filed a reply to the opposition. Judge Bruno heard argument on the motion for

summary judgment on February 19, 2019. At the hearing, the court asked the defendants to submit a supplemental memorandum of case law that supported their legal arguments. The defendants complied with that request.

On April 25, 2019, the court, *Bruno*, *J.*, issued an order granting the motion for summary judgment as to liability. The court provided no legal analysis for its ruling, including failing to address directly any of the defendants' original special defenses. Rather, the court provided the following statement only: "When counsel for [Wilmington] and the defendant[s] appeared at short calendar in February to present their respective arguments on this motion for summary judgment . . . this case had been pending since 2011. Since that hearing, there have been many more pleadings filed . . . addressed to [the motion for summary judgment], and . . . specifically to information asserted by defense counsel during oral argument on the motion for summary judgment. The court has had the benefit of the able oral arguments of counsel, as well as the pleadings, and has considered all of this in reaching its decision that summary judgment should enter for the plaintiff. . . . The motion for summary judgment having been heard, the court finds that there are no genuine issues of material fact. The motion is granted as to liability. Judgment may enter for [Wilmington] on the complaint."

On April 29, 2019, the court, *Bellis*, *J.*, issued a dormancy dismissal order that required Wilmington "to file the appropriate motion and obtain judgment on or before [July 29, 2019], or the case will be dismissed for failure to prosecute with due diligence." Wilmington, on July 23, 2019, filed a caseflow request asking the court to grant it an exemption to the court's dormancy order or, alternatively, to write in the matter on the upcoming foreclosure calendar for July 29, 2019. In

support of its request, Wilmington stated that it "has all the requisite documents to obtain judgment including an updated appraisal and executed affidavit of debt. Given the aforementioned, it would be an exercise of futility and would unduly burden the court's docket to dismiss this matter and require [Wilmington] to commence a new action." The following day, the court clerk issued an order that the motion for judgment would be written on the foreclosure docket for July 29, 2019.

On July 25, 2019, Wilmington filed a foreclosure worksheet, an affidavit of debt, and an affidavit regarding attorney's fees. The next day, the defendants filed a memorandum in opposition to the motion for judgment of strict foreclosure.[8] Wilmington filed a reply to the opposition that same day. On the day of the July 29, 2019 hearing, Wilmington filed a motion for extension of time and a caseflow request arguing, in essence, that it sought relief from the dormancy order in the event that the court determined additional argument would be necessary or was otherwise inclined to hold off the hearing on the motion for judgment of strict foreclosure.

[8] Specifically, the defendants raised the following six arguments: "(1) The defendants dispute the amount of the debt and raised a defense. Practice Book § 23-18 does not apply and a decision that relies on [the affidavit of debt] is improper. An evidentiary hearing must be held to decide the amount of the debt.

"(2) The defendants dispute the amount of the debt and the appraised value of the house and believe that it is undervalued by at least $20,000.

"(3) The [affidavit of debt] is hearsay, it is contradicted by [Wilmington's] previous admissions, is otherwise unreliable, and it fails to prove the amount of the debt.

"(4) The affidavit of attorney's fees fails to meet any showing of reasonableness and should be thrown out.

"(5) [Wilmington's] attempt to rush to judgment before the dormancy dismissal order enters has severed the defendants' rights to a fair hearing.

"(6) As a matter of equity, the defendants should not be liable, and [Wilmington] should not experience a windfall for the delay caused by the . . . multiple substitutions, delays, and failure to diligently prosecute this matter that has been pending for over seven years. The court should adjust the amount of the damages accordingly."

The court, *Bruno*, *J.*, proceeded with the hearing on the motion for judgment of strict foreclosure, following which it rendered judgment in favor of Wilmington. The court made findings as to the amount of the debt and the fair market value of the property, and it set law days to commence on October 29, 2019. The court's order did not address the substance of the defendants' objections.[9] The defendants timely filed the present appeal.

Shortly after the appeal was filed, on October 4, 2019, Wilmington filed a motion for articulation asking Judge Bruno to provide the factual and legal basis for her decision to grant the motion for summary judgment as to liability. Wilmington, citing this court's then recent decision in *Bayview Loan Servicing, LLC* v. *Frimel*, 192 Conn. App. 786, 218 A.3d 717 (2019), argued that the court's summary judgment ruling had failed to include any findings by the court that Wilmington had established a prima facie case for foreclosure or met its evidentiary burden of establishing in the first instance that there were no genuine issues of material fact.[10]

On February 4, 2020, Judge Stevens issued the following case management order: "This motion for articulation, and all other matters [in] this case involving Judge

[9] On August 12, 2019, Judge Bruno issued an order directed at the defendants' opposition to the motion for judgment of strict foreclosure, stating simply that the opposition was marked "off" and citing to the "[c]ourt's entry of strict foreclosure on July 29, 2019."

[10] In *Bayview Loan Servicing, LLC* v. *Frimel*, supra, 192 Conn. App. 786, the trial court granted the plaintiff mortgagee's motion for summary judgment as to liability only and subsequently rendered a judgment of foreclosure by sale. Id., 791–92. This court reversed the judgment. Id., 788. It determined, in relevant part, that the trial court had improperly granted summary judgment solely on the ground that the defendant mortgagor had not timely filed any opposition to summary judgment. Id., 793. This court explained: "[T]he court was required to consider, in the first instance, whether the plaintiff, as the movant, had satisfied its burden of establishing its entitlement to summary judgment. *If the plaintiff had failed to meet its initial burden*, it would not matter if the defendant had not filed any response." (Emphasis added.) Id., 795.

Bruno, are hereby reassigned to Judge Spader." Judge Spader soon thereafter issued an order effectively granting the motion for articulation and articulating what it speculated to be the factual and legal basis for Judge Bruno's decision to grant summary judgment as to liability. The court indicated that it had read Judge Bruno's order on the motion for summary judgment, reviewed all the applicable pleadings, and listened to a recording of oral argument. It acknowledged that Judge Bruno did "not proactively make a statement in her order of the plaintiff's setting forth its prima facie case," but the court nonetheless concluded that "[i]t is clear, however, that the plaintiff did set forth its prima facie case . . . ." Judge Spader then proceeded to set forth his analysis for why Wilmington was entitled to summary judgment. In addition to concluding that Wilmington had established its entitlement to summary judgment, the court also concluded that "[t]he defendants simply fail to establish their special defenses."[11] The defendants filed a motion for further articulation directed at Judge Spader's "articulation," which, according to the defendants, contained "factual detail[s] not present in the original order and case law that was not briefed or argued by the parties." The court denied the defendants' motion.

This court later granted the defendants permission to file a late motion for articulation directed at Judge Bruno's denial of their request to amend their special defenses. Specifically, the defendants asked the trial court to articulate the factual and legal basis for denying their request to amend and to state whether the court had found that the proposed special defenses were valid under *U.S. Bank National Assn.* v. *Blowers*, 332 Conn.

[11] The defendants, of course, had no obligation to "establish their special defenses" in opposing summary judgment, but only needed to raise a genuine issue of material fact with respect to one or more of their defenses.

656, 212 A.3d 226 (2019).[12] This motion for articulation again was referred to Judge Spader, who denied the motion, stating in relevant part that "while Judge Bruno is unavailable presently, had the movant requested an articulation from her on a timelier basis, she may have been able to provide one. This court is unable to provide more articulation but posits that none is really necessary. A summary judgment motion was pending and it was then that the defendant[s] wanted to amend its defenses, the court would not then allow the *late prejudicial* amendment, which was in its discretion to do."[13] (Emphasis added.) The defendants filed a motion for

[12] In *Blowers*, our Supreme Court discussed the standard that courts apply in evaluating counterclaims and special defenses asserted by defendants in mortgage foreclosure actions, clarifying that the so-called "making, validity or enforcement test" that routinely had been applied by lower courts is "nothing more than a practical application of the standard rules of practice that apply to all civil actions to the specific context of foreclosure actions." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 667; see also Practice Book § 10-10. The Supreme Court specifically held that "a proper construction of 'enforcement' [under that test] includes allegations of harm resulting from a mortgagee's wrongful postorigination conduct in negotiating loan modifications, when such conduct is alleged to have materially added to the debt and substantially prevented the mortgagor from curing the default." (Footnote omitted.) *U.S. Bank National Assn.* v. *Blowers*, supra, 667. The court observed that "appellate case law recognizes that conduct occurring after the origination of the loan, after default, and even after the initiation of the foreclosure action may form a proper basis for defenses in a foreclosure action." Id., 672. The court continued: "[A]llegations that the mortgagee has engaged in conduct that wrongly and substantially increased the mortgagor's overall indebtedness, caused the mortgagor to incur costs that impeded the mortgagor from curing the default, or reneged upon modifications are the types of misconduct that are directly and inseparably connected . . . to enforcement . . . . Such allegations, therefore, provide a legally sufficient basis for special defenses in [a] foreclosure action." (Citations omitted; internal quotation marks omitted.) Id., 675–76.

[13] We note, on the basis of our review of the record, that Judge Bruno, who denied the request to amend without comment, never made any findings that the defendants' request to amend, which was made prior to the close of pleadings, was somehow untimely or made solely for the purpose of delay. Nor did the court indicate that granting the request would have unduly prejudiced Wilmington.

review of the denial of their motion for articulation. This court granted the motion for review but denied the relief requested therein.[14]

With the following background in mind, we turn to our discussion of the defendants' first claim on appeal. The defendants claim that the court abused its discretion by denying their request to amend their special defenses to the foreclosure complaint. The defendants argue that the amendments would not cause delay and that the amendments were necessary "to conform with facts verified by the final resolution of several discovery disputes." For the reasons that follow, we agree with the defendants.

General Statutes § 52-130 provides: "Parties may amend any defect, mistake or informality in the pleadings or other parts of the record or proceedings. When either party supposes that in any part of the pleadings he has missed the ground of his plea, and that he can plead a different plea that will save him in his cause, he may change his plea, answer, replication or rejoinder, as the case may be, and plead anew, and the other party

[14] Although the defendants did not file a motion for review of Judge Spader's earlier articulation or challenge in their later motion for review Judge Spader's authority to articulate decisions rendered by Judge Bruno, we are aware of no statute or rule of practice that authorizes an articulation of a trial court's ruling by anyone other than the judge who rendered it. Practice Book § 66-5 expressly provides that, upon the filing of a motion for articulation, "[t]he appellate clerk shall forward the motion . . . *to the trial judge who decided, or presided over, the subject matter of the motion* . . . for a decision on the motion. . . ." (Emphasis added.) We have repeatedly stated that a request for articulation is not intended to provide the trial court with an opportunity to substitute a new decision or to change the reasoning or basis for a prior decision. See, e.g., *Lusa* v. *Grunberg*, 101 Conn. App. 739, 743, 923 A.2d 795 (2007). If a judge other than the one who rendered a decision is permitted to attempt to divine from its review of the record the factual and legal basis for a decision, the result, effectively, is a wholly new decision. Because there is no way to know whether that new decision was rendered on the same factual and legal basis as the original, we disavow the procedure followed in this case.

shall have reasonable time to answer the same; and, in any case when a party amends or alters any part of the pleadings or pleads anew, if it occasions any delay in the trial or inconvenience to the other party, he shall be liable to pay costs at the discretion of the court. Any court may restrain the amendment or alteration of pleadings, so far as may be necessary to compel the parties to join issue in a reasonable time for trial." See also Practice Book § 10-60. Thus, by statute, a party, as a matter of right, may make substantive amendments to any pleading. That right is subject only to the court's discretion to award costs or to limit an amendment if doing so is *necessary* to prevent undue delay of a trial.

"The granting or denial of a motion to amend the pleadings is a matter within the trial court's discretion. . . . In the interest of justice courts are liberal in permitting amendments; *unless there is a sound reason, refusal to allow an amendment is an abuse of discretion.* . . . The trial court is in the best position to assess the burden which an amendment would impose on the opposing party in light of the facts of the particular case. The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." (Citations omitted; emphasis added; internal quotation marks omitted.) *Baker* v. *Cordisco*, 37 Conn. App. 515, 522–23, 657 A.2d 230, cert. denied, 234 Conn. 907, 659 A.2d 1207 (1995).

"In determining whether there has been an abuse of discretion [in granting or denying an amendment], much depends on the circumstances of each case. . . . In the final analysis, the court will allow an amendment unless it will cause an unreasonable delay, mislead the opposing party, take unfair advantage of the opposing party or confuse the issues, or if there has been negligence or laches attaching to the offering party." (Internal quotation marks omitted.) *Miller* v. *Fishman*, 102

Conn. App. 286, 293, 925 A.2d 441 (2007), cert. denied, 285 Conn 905, 942 A.2d 414 (2008).

"The court's discretion [to deny an amendment] is not unfettered; it is a legal discretion subject to review. . . . The trial court's discretion imports something more than leeway in decision making and should be exercised in conformity with the spirit of the law and should not impede or defeat the ends of substantial justice." (Citation omitted; internal quotation marks omitted.) Id., 291–92.

"In exercising its discretion with reference to a motion for leave to amend, a court should ordinarily be guided by its determination of the question whether the greater injustice will be done to the mover by denying him his day in court on the subject matter of the proposed amendment or to his adversary by granting the motion, with the resultant delay." (Internal quotation marks omitted.) *Jacob* v. *Dometic Origo AB*, 100 Conn. App. 107, 113, 916 A.2d 872, cert. granted, 282 Conn. 922, 925 A.2d 1103 (2007) (appeal withdrawn August 7, 2007). The law of this state favors courts allowing amendments in the absence of some sound basis for not doing so; id., 111; particularly if the record fails to disclose some significant injustice or prejudice to the nonmoving party. Id., 114; see also *Conference Center Ltd.* v. *TRC*, 189 Conn. 212, 216–17, 455 A.2d 857 (1983) ("a trial court may be well-advised to exercise leniency when amendments are proffered in response to a motion for summary judgment, rather than on the eve of trial"); *Miller* v. *Fishman*, supra, 102 Conn. App. 286 (holding that it was abuse of discretion for court to rule on motion for summary judgment without first considering pending request to amend because proposed amendment would not have unduly delayed trial or unfairly prejudiced other party); but see *Citizens National Bank* v. *Hubney*, 182 Conn. 310, 313, 438 A.2d 430 (1980) (court properly exercised discretion by not

permitting amendment "after the pleadings had been closed and the motion for summary judgment filed"). We are mindful that, "[a]lthough it is not [the] habit [of appellate courts] to disturb a trial court's determination of whether an amendment should be permitted, we have done so on rare occasions when allowing the rul[ing] to stand would work an injustice to one of the parties." (Internal quotation marks omitted.) *Connecticut National Bank* v. *Voog*, 233 Conn. 352, 369, 659 A.2d 172 (1995). Our careful review of the record before us leads us to conclude, for the following reasons, that this is such a case.

First, the pleadings had not yet been closed at the time the defendants sought to amend their answer and special defenses. Wilmington in fact had not yet filed *any response to the original special defenses* raised by the defendants. Accordingly, the court could not reasonably have viewed the need to respond to the amended answer and special defenses as an "inconvenience to the other party . . . ." General Statutes § 52-130. Moreover, although Wilmington's predecessor, Nationstar, had filed a motion for summary judgment, that motion already had languished on the docket for a significant period of time without being claimed for a hearing by Wilmington.

Second, it was appropriate procedurally and as a matter of legal strategy for the defendants to wait to fully develop and perfect their special defenses until Wilmington had complied with their discovery request. They made their request to amend promptly thereafter. It was reasonable for the defendants to wait to amend their special defenses until discovery was completed because information regarding the missing payment records may have proved relevant to the defendants' theory of defense that escrow payments had been improperly calculated and increased, which had a bearing on both the amount of any debt owed and the issue

of default. The request to amend also cannot reasonably be construed as having been made "on the eve of trial . . . ." *Conference Center Ltd.* v. *TRC*, supra, 189 Conn. 217. No trial date had been scheduled, and the court could have permitted the amendments and then allowed Wilmington sufficient time to respond without "occasion[ing] any delay in the trial . . . ." General Statutes § 52-130.

Third, to the extent that the case had been pending for a significant period of time, some of that delay fairly is attributable to Wilmington or its predecessors in interest rather than to the defendants. Certainly, the underlying foreclosure action had been on the trial court's docket for many years, and the court had a legitimate interest in advancing the case. A significant portion of the delay in this case, however, nearly four years, was the result of the lengthy court-sponsored mediation process. Moreover, the multiple transfers of the mortgage during the pendency of the action and the resulting need to substitute plaintiffs resulted in additional delays that were outside of the control of the defendants. Nothing in the record before us would support a finding that the defendants engaged in unreasonable or purely dilatory behavior in defending the foreclosure action, certainly none that would justify disallowing an amendment of their answer and special defenses prior to the close of pleadings. For example, the record does not reflect that the defendant filed multiple and frivolous bankruptcy proceedings, improper interlocutory appeals, or excessive and unproductive motions. Although the defendants engaged in motion practice, they only filed pleadings permitted under our rules of practice and in the proper order. See Practice Book §§ 10-6 and 10-8. Furthermore, the defendants' motions were meritorious, resulting, for example, in the striking of the original complaint. The operative

complaint in this matter was not filed until 2017, a few years prior to the judgment of strict foreclosure.

Finally, we are mindful that the defendants sought to have the court articulate the factual and/or legal basis for its decision to disallow the defendants' amendment, but they were thwarted in their efforts by the unavailability of Judge Bruno. "[O]ur appellate courts often have recited . . . that, in the face of an ambiguous or incomplete record, we will presume, *in the absence of an articulation*, a trial court acted correctly, meaning that it undertook a proper analysis of the law and made whatever findings of the facts were necessary." (Emphasis in original.) *Zaniewski* v. *Zaniewski*, 190 Conn. App. 386, 396, 210 A.3d 620 (2019); see also *Bell Food Services, Inc.* v. *Sherbacow*, 217 Conn. 476, 482, 586 A.2d 1157 (1991). This court has made clear, however, that the adoption of such a presumption of correctness is not warranted in a case such as the present one "in which a party has done all that can reasonably be expected to obtain an articulation but has been thwarted through no fault of its own." *Zaniewski* v. *Zaniewski*, supra, 397.[15]

In sum, the court failed to provide any explanation, let alone a " 'sound reason,' " for denying the defendants'

[15] In *Zaniewski*, this court declined to apply any presumption of correctness to the trial court orders issued as part of a judgment of dissolution of marriage. Like in the present case, the court's decision in *Zaniewski* was "devoid of any factual findings in support of its conclusions." *Zaniewski* v. *Zaniewski*, supra, 190 Conn. App. 397. The appellant in *Zaniewski* filed a motion for an articulation but was prevented from obtaining one by the immediate retirement of the trial judge in that case following the issuance of his decision. Id., 391. This court reasoned, in part, that an action to dissolve a marriage is an equitable proceeding and, accordingly "principles of equity must guide the entire process, including any appeal." Id., 397. To the extent that our decision in *Zaniewski* turned on the equitable nature of the underlying proceedings, we note that a foreclosure action is also equitable in nature. See *People's United Bank* v. *Sarno*, 160 Conn. App. 748, 754, 125 A.3d 1065 (2015).

request to amend their special defenses. *Baker* v. *Cordisco*, supra, 37 Conn. App. 522. The record reflects no such reason. As previously stated, at the time they made their request, the pleadings had not yet closed. Although a motion for summary judgment had been filed, the motion had not been calendared for a hearing on its merits. No trial date had been set, and, although the trial court had an interest in moving the case forward, this was not a matter in which the defendants had engaged in dilatory defense tactics. For all these reasons, we conclude that the court's denial of the defendants' request to amend their answer and special defenses was an abuse of discretion.[16]

The court's error in failing to allow the amended answer and special defenses requires the reversal of the court's subsequent order granting the motion for summary judgment. "[B]ecause any valid special defense raised by the defendant ultimately would prevent the court from rendering judgment for the plaintiff, a motion for summary judgment should be denied when any [special] defense presents significant fact issues that should be tried." (Internal quotation marks omitted.) *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 745, 196 A.3d 328 (2018). Furthermore, because the judgment of strict foreclosure was rendered in part on the summary determination of liability, that judgment likewise cannot stand.

The judgment of strict foreclosure, the summary judgment as to liability only, and the trial court's denial of the defendants' request to amend their special defenses are reversed, and the case is remanded with direction to grant the defendants' request to amend the answer and special defenses and for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

[16] Nothing in this opinion should be read as commenting on the merits of the defendants' proposed amended pleading.

MONICA R. OVERLEY *v.* MARK S. OVERLEY
(AC 43249)

Bright, C. J., and Clark and Eveleigh, Js.

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and making certain orders regarding the parties' finances and custody of the parties' three minor children. *Held*:

1. This court declined to review the defendant's claim that the trial court improperly awarded the marital home to the plaintiff without first awarding him a credit for the separate property he contributed to its purchase: the defendant failed to distinctly raise at trial the claim that the funds he withdrew from a trust to pay for the home were his separate property, and, instead, had maintained that the funds were a marital liability, and that the court was required to allocate that liability and the marital home between the parties; moreover, although the plaintiff did not argue that the defendant failed to preserve this claim, it would have been manifestly unjust to both the plaintiff and the trial court to have permitted the defendant to pursue this claim on appeal.
2. The trial court improperly ordered that the defendant may not, under any circumstances, deduct alimony payments from his income for tax purposes, which was consistent with recently enacted federal tax laws but contravened the parties' prenuptial agreement; contrary to the plaintiff's argument, the defendant's claim that this order was improper was, in part, preserved for appeal, because, although the defendant could have articulated more fully to the trial court how it could have reconciled the apparent conflict between the parties' agreement and the new federal tax laws, both the plaintiff and the trial court had notice of the defendant's claim, he consistently sought enforcement of the alimony provision of the parties' prenuptial agreement as written, he explained to the court that alimony payments remained deductible in Puerto Rico where he resided, and the plaintiff addressed the issue in her posttrial brief; moreover, the defendant's additional, related claims were not raised at trial and were, therefore, unreviewable on appeal; furthermore, the court's order was overly broad in that it would prevent the defendant from deducting his alimony payments in accordance with the parties' prenuptial agreement even if his income tax obligations are governed by the laws of a jurisdiction that would otherwise permit such deductions and even if federal tax laws are amended in the future to permit such deductions.
3. The trial court did not abuse its discretion in denying the defendant's motion for a continuance to secure new counsel: the court's order was reasonable given that the dissolution action had been pending for more

than two years and the defendant sought a continuance of up to three months, less than one week before trial was scheduled to begin; moreover, the court properly balanced the parties' competing interests and reasonably concluded that the plaintiff's interest in a prompt and final resolution of the matter outweighed any prejudice the defendant might experience if he was required to proceed as a self-represented party, particularly because the defendant had previously been represented by two different attorneys who had each withdrawn on the ground of a breakdown in the attorney-client relationship, and to grant a continuance on the eve of trial could have resulted in a prolonged delay in a matter involving the well-being of minor children.

Argued September 14—officially released December 28, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield; thereafter, the matter was transferred to the Regional Family Trial Docket at Middletown; subsequently, the court, *Hon. Gerard I. Adelman*, judge trial referee, denied the defendant's motion for a continuance; thereafter, the matter was tried to the court, *Hon. Gerard I. Adelman*, judge trial referee; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed in part; reversed in part*; *further proceedings*.

Anthony A. Piazza, with whom, on the brief, was *John H. Van Lenten*, for the appellant (defendant).

Sarah E. Murray, for the appellee (plaintiff).

Opinion

CLARK, J. The defendant, Mark S. Overley, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Monica R. Overley. He claims that the court improperly (1) failed to award him a separate property credit for his contribution to the purchase of the marital home prior to distributing that property as a marital asset, (2) contravened the parties' prenuptial

agreement governing the tax treatment of alimony payments he was ordered to pay the plaintiff, and (3) denied his request for a continuance to obtain new counsel. We disagree with the defendant's first and third claims but agree, in part, with his second claim. We therefore reverse in part and affirm in part the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. In 2006, the parties were married and established residence in New York. Prior to the marriage, they executed a prenuptial agreement (agreement). The agreement provides that, in the event of a marital dissolution, if the value of the marital assets do not exceed a specified amount and the parties are unable to agree upon an equitable division of the marital assets, either party may seek a distribution in court. The agreement includes a choice of law provision, which provides that it shall be interpreted and construed under the laws of New York. Additionally, it stipulates that the plaintiff is entitled to alimony. Under the agreement, alimony payments are to be taxable as income to the plaintiff and deductible from the defendant's income.

During the marriage, the parties moved from New York to Connecticut and had three children together. The defendant primarily worked in finance, but later formed two limited liability companies that raise capital for investment managers. The plaintiff did not work outside the home on a regular basis and assumed the majority of the childcare responsibilities. In 2014, the defendant informed the plaintiff that he wanted to move the family and his businesses to Puerto Rico to take advantage of its more favorable tax laws. The plaintiff strongly opposed the idea because of the community ties she and the children had developed in Connecticut.

In 2016, however, she agreed to relocate to Puerto Rico on a trial basis, on the condition that the parties

buy a home in Connecticut where the family could return if the move proved unsuccessful. Consequently, the parties purchased a home in Westport. The defendant moved to Puerto Rico in May, 2016, and the plaintiff and their children joined him shortly thereafter.

In April, 2017, the plaintiff and the children moved back to Connecticut. The plaintiff commenced this dissolution action on April 25, 2017. Because the defendant continued to reside in Puerto Rico, a lengthy dispute followed regarding whether Puerto Rico or Connecticut had jurisdiction to resolve the matters involving the parties' children. On July 27, 2018, the dispute was resolved in favor of Connecticut assuming jurisdiction over the child support and custody issues. Trial initially was scheduled to take place in November, 2018. The defendant was represented by counsel at that time. When the parties appeared for trial, however, the court, for administrative reasons, continued the trial and transferred the case to the Regional Family Trial Docket.

On May 7, 2019, less than one week before the rescheduled dissolution trial was to commence, the defendant's counsel moved to withdraw his appearance and for a continuance in order to provide the defendant time to secure replacement counsel. The next day, the defendant filed an appearance as a self-represented party. The court denied the motion for a continuance. At trial, on May 13, 2019, the defendant renewed his motion for a continuance to secure replacement counsel. After hearing from the defendant and the plaintiff, who was represented by counsel, the court denied the motion. The parties were the only witnesses at trial, and neither party contested the validity or enforceability of the agreement. After the conclusion of evidence, the court ordered the parties to submit posttrial briefs concerning alimony and the distribution of marital property. The defendant retained counsel, who appeared in the case and filed a posttrial brief on his behalf.

On July 11, 2019, the court issued its memorandum of decision dissolving the marriage. In its decision, the court ordered the defendant to quitclaim his interest in the marital home to the plaintiff and to pay alimony in the amount of $10,000 per month, terminating upon the death of either party, the plaintiff's remarriage, or July 1, 2028. Contrary to the parties' agreement, the court also ordered that the defendant's alimony payments shall be nondeductible from his income and nontaxable as income to the plaintiff. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the trial court improperly awarded the marital home to the plaintiff without first awarding him a credit for the separate property he contributed to its purchase, which he claims is required under New York law. Our review of the record discloses that the defendant never raised this claim in the trial court. Accordingly, we decline to review it.

The following additional facts are relevant to our decision. The defendant is a cotrustee and beneficiary of a trust that was created prior to the marriage. To fund a $700,000 cash purchase of the marital home in Westport, the defendant withdrew $699,000 from the trust. At trial, the parties agreed that the defendant's interest in the trust is the defendant's separate property and that, pursuant to the parties' agreement, the home was marital property because it was purchased during the marriage and title was in both parties' names.

Under the agreement, if the pretax value of marital assets did not exceed a certain amount in accordance with a formula set forth in the agreement and the parties were unable to agree upon a division of the marital assets, either party could ask a court to divide the marital assets in accordance with New York law. Both parties agreed, and the trial court found, that the value of

the marital assets did not exceed the threshold amount set forth in the agreement and that they had not reached an agreement with respect to the division of marital assets. As a result, the court was required to divide the marital assets in accordance with New York law.[1]

The court found that the value of the home was $750,000 and that the total value of all marital assets equaled approximately $902,000. The home thus comprised the bulk of the parties' marital property. The defendant contended throughout the proceedings that he had borrowed the money used to purchase the home from the trust. Accordingly, in his financial affidavits, the defendant classified the $699,000 withdrawal from the trust as a marital liability. In his posttrial brief, the defendant argued that the money withdrawn from the trust was a joint liability and that the court should exercise its power of equitable distribution to order that the marital home be sold and the proceeds be used to satisfy that liability.[2] At trial, however, the defendant had also testified that, in the past, he had taken advances from the trust in the form of loans for the purpose of delaying or avoiding the tax consequences of distributions. The plaintiff asked the court to award her the home to maintain stability for the parties' children and contended that the trust loan was not a genuine debt but, rather, an advance against the defendant's future distributions from the trust.

In its memorandum of decision, the court ultimately found that the funds the defendant withdrew from the

[1] New York is an equitable distribution state. See N.Y. Dom. Rel. Law § 236 (B) (5) (d) (McKinney 2020) (delineating fourteen factors court must weigh when allocating marital property).

[2] The defendant asserted and the court agreed that, under New York law, marital property includes both assets and liabilities. See, e.g., *Haggerty* v. *Haggerty*, 169 App. Div. 3d 1388, 1390, 92 N.Y.S.3d 773 (2019).

trust to buy the marital home were, in fact, "distributions called loans to avoid tax consequences."[3] Pursuant to New York's equitable distribution law, the court determined that the plaintiff should retain the home and ordered the defendant to quitclaim his rights and interest therein to the plaintiff, while the defendant "assumed responsibility—if any—for the loan from the [trust] used to purchase that property."

On appeal, the defendant characterizes the funds withdrawn from the trust to purchase the home as his separate property, not a marital liability, and claims for the first time that the court was required to award him a separate property credit in the amount of those funds prior to distributing the remaining value of the home as a marital asset. He argues that New York law entitles a party who contributes separate property toward the purchase of a marital asset to a credit in the amount so contributed before marital property is distributed between the parties in a dissolution action. See, e.g., *Jacobi* v. *Jacobi*, 118 App. Div. 3d 1285, 1286, 988 N.Y.S.2d 339 (2014) (spouse entitled to credit for contribution of separate property toward purchase of marital home).

During oral argument, however, the defendant conceded that he never made this argument in the trial court. Our review of the record confirms that, throughout the dissolution proceedings, the defendant maintained that the funds he withdrew from the trust to pay for the home were a loan that constituted a marital liability, and that, in contrast to the separate property credit theory he advances on appeal, the court was required to allocate that liability and the marital home between the parties in accordance with New York's

[3] The defendant does not challenge the trial court's finding on appeal. The question of whether the funds were a loan or distribution does not alter our resolution of this claim.

equitable distribution scheme. The court ultimately adopted that approach and, in the exercise of its substantial discretion; see, e.g., *Ragucci* v. *Ragucci*, 170 App. Div. 3d 1481, 1482, 96 N.Y.S.3d 736 (2019) ("[i]t is well settled that trial courts are granted substantial discretion in determining what distribution of marital property—including debt—will be equitable under all the circumstances" (internal quotation marks omitted)); awarded the plaintiff the marital home and assigned to the defendant the liability, if any, associated with the funds he withdrew from the trust to purchase the home.

"It is fundamental that claims of error must be distinctly raised and decided in the trial court." (Internal quotation marks omitted.) *DeChellis* v. *DeChellis*, 190 Conn. App. 853, 860, 213 A.3d 1, cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019). "[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Remillard* v. *Remillard*, 297 Conn. 345, 351–52, 999 A.2d. 713 (2010); see also Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial").

Although the plaintiff has not argued that the defendant failed to preserve the separate property credit theory he has advanced before this court, we conclude that it would be manifestly unjust to both the plaintiff and the trial court to permit the defendant to pursue

that claim in this appeal. "[A] party *cannot present a case to the trial court on one theory and then seek appellate relief on a different one* . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would . . . [be] unfair both to the [court] and to the opposing party." (Emphasis added; internal quotation marks omitted.) *State* v. *Rodriquez*, 192 Conn. App. 115, 119, 217 A.3d 21 (2019). "We will not promote a Kafkaesque academic test by which [a trial judge] may be determined on appeal to have failed because of questions never asked of [him] or issues never clearly presented to [him]." (Internal quotation marks omitted.) *DiGiuseppe* v. *DiGiuseppe*, 174 Conn. App. 855, 864, 167 A.3d 411 (2017). Accordingly, we decline to review the defendant's claim that the court misapplied New York law when it failed to award him a separate property credit for his contribution to the purchase of the marital home.

II

The defendant's second claim is that the court improperly contravened the parties' agreement when it ordered that he may not deduct for income tax purposes the alimony payments he was ordered to pay the plaintiff. The plaintiff counters that the defendant's claim is not reviewable because the defendant failed to raise this claim in the trial court and that, even if the issue is reviewable, the court properly severed the alimony tax provision from the agreement because it is unenforceable under the federal tax code. We conclude that the defendant's claim was raised at trial and, therefore, is reviewable. We also conclude that the court's order unconditionally prohibiting the defendant from deducting alimony payments from his income for tax purposes was overly broad to the extent that it purports (1) to preclude the defendant from taking such deductions if his income tax obligations are governed by the laws of a jurisdiction that permits such deductions, or

(2) to preclude either party from seeking to enforce the agreement in the future if the federal tax laws are amended in a manner that permits enforcement of the agreement.

A

We first address the plaintiff's argument that the defendant failed to preserve this claim. As we previously explained in part I of this opinion, in general, a party must distinctly raise a claim at trial to preserve the issue for appeal. See Practice Book § 60-5. "The purpose of our preservation requirements is to ensure fair notice of a party's claims to both the trial court and opposing parties." (Internal quotation marks omitted.) *Moyher* v. *Moyher*, 198 Conn. App. 334, 340, 232 A.3d 1212, cert. denied, 335 Conn. 965, 240 A.3d 284 (2020). "Thus, because the sine qua non of preservation is fair notice to the trial court . . . the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Citation omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753–54, 66 A.3d 869 (2013).

In his December 20, 2017 answer and cross-complaint, the defendant demanded enforcement of the agreement. The agreement provided that alimony payments to the plaintiff "shall be includible in [the plaintiff's] income and deductible from [the defendant's] income for income tax purposes." Moreover, during the course of the trial, the court asked the defendant to explain whether he was proposing draft orders that permitted him to deduct alimony payments from his taxable income and how the recent changes to the federal tax laws repealing such deductions impacted his

proposal.[4] The defendant responded that "in Puerto Rico, [alimony] still is deductible. Alimony comes off before you get to the taxable income number. So, there is no change in the . . . Puerto Rico tax code in respect to [my proposed orders]."

Although the defendant's posttrial brief did not specifically address what effect, if any, the federal tax law change had on the parties' agreement, the defendant did, in his answer and cross-complaint, and closing argument, urge the court to order alimony in accordance with the parties' agreement. The plaintiff argued, conversely, that the tax provision in the parties' agreement was without force and effect because alimony payments are no longer deductible due to the recent changes to the federal tax laws and that, consequently, the provision of the agreement permitting such deductions should be severed from the agreement.[5] In its memorandum of decision, the court discussed the recent changes to the federal tax laws, but did so only in the context of its analysis of a separate provision of the agreement concerning the amount of alimony to which the plaintiff was entitled under the agreement. Ultimately, the court ordered, without discussion, that

[4] In 2017, Congress passed the Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97, 131 Stat. 2054 (2017), which provides that, with respect to divorce decrees and separation agreements executed on or after December 31, 2018, a payor of alimony may not deduct such payments from taxable income and a recipient of alimony is not required to report the receipt of alimony payments as taxable income. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11051, 131 Stat. 2054, 2089 (2017) (repealing 26 U.S.C. §§ 71 and 215). In divorce decrees and separation agreements executed prior to the effective date of the TCJA, a payor of alimony may deduct alimony payments from taxable income, in which case a recipient of alimony is required to report alimony as taxable income. 26 U.S.C. §§ 71 and 215 (2012).

[5] The parties' agreement contains a severability clause that provides: "In the event of a determination that any provision of this Agreement is without force and effect, the remaining provisions hereof shall not be affected thereby, and the obligations of the parties shall continue in full force and effect with respect to the performance of such remaining provisions."

"alimony shall be nontaxable to the plaintiff and nondeductible to the defendant."

On the basis of our review of the entire record, we conclude that, under the specific circumstances of this case, the defendant's claim concerning the tax treatment of his alimony payments was preserved because both the plaintiff and the court had notice of that claim. Throughout the proceedings, the defendant consistently sought enforcement of the parties' agreement as written. More significantly, in response to the court's question about recent changes to the federal tax laws, the defendant explained that alimony payments remained deductible in Puerto Rico, where he resided, and that, accordingly, the federal tax laws did not interfere with the enforcement of the agreement or the draft orders that he had proposed. Although the defendant could have articulated more fully how the court could have reconciled the apparent conflict between the parties' agreement and the new federal tax laws, we conclude that the issue was preserved.[6]

B

Having determined that the defendant's claim is reviewable, we now address whether the court improperly prohibited him from deducting his alimony payments from his taxable income in any tax returns that

[6] We limit our review, however, to the precise issue that was fairly before the trial court. In his brief to this court, the defendant additionally claims that the court's order improperly (1) precludes him from arguing to the Internal Revenue Service that the alimony at issue in this case is "grandfathered" under the Tax Cuts and Jobs Act; see footnote 4 of this opinion; and the agreement is therefore enforceable, and (2) contravenes the parties' agreement concerning how much alimony the plaintiff should receive because at the time the parties entered the agreement, they both understood and presumed that the alimony the plaintiff would receive would be taxable income. The defendant thus contends that the court's order results in an unexpected "windfall" to the plaintiff that is inconsistent with the agreement. Because the defendant did not raise either of these claims at trial, we decline to review them on appeal. Instead, we limit our review to the discrete claim that the court improperly contravened the parties' agreement when

he may file in the future. We first set forth the standard of review that governs our resolution of this claim. Although the choice of law provision in the parties' agreement provides that it "shall be interpreted, construed and governed under the laws of the state of New York," Connecticut law guides our resolution of all procedural issues, including the standard of review to be applied in an appeal from a Connecticut court's judgment of dissolution. See *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 447, 165 A.3d 1137 (2017) (matters of substance are analyzed according to parties' choice of law provision but procedural issues are governed by Connecticut law).

"[A]lthough the court has broad equitable remedial powers in the area of marital dissolutions . . . our marital dissolution law is essentially a creature of, and governed by, statute. . . . The Superior Court's power to grant divorces and thereby dissolve marriages comes from statutory authority, and from such jurisdiction over divorce derives the court's jurisdiction to make and enforce orders . . . . Thus, it is well settled that judicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the court correctly applied the law and could reasonably have concluded as it did. . . . Notwithstanding the great deference accorded the trial court in dissolution proceedings, a trial court's ruling . . . may be reversed if, in the exercise of its discretion, the trial court applies the wrong standard of law." (Citations omitted; internal quotation marks omitted.) *Loughlin* v. *Loughlin*, 280 Conn. 632, 653–54, 910 A.2d 963 (2006).

As the court noted in its decision, Congress recently passed the Tax Cuts and Jobs Act (TCJA), which

it ordered, without exception, that the defendant's alimony payments shall be nondeductible from his income for tax purposes.

included certain changes to the provisions of the federal tax code governing the tax treatment of alimony payments. See footnote 4 of this opinion. Specifically, under the TCJA, alimony payments are no longer considered taxable income of the recipient and may not be deducted from income by the payor. We agree with the plaintiff that neither the parties' prenuptial agreement nor a decree of dissolution can supersede the federal tax code. See *Shenk* v. *C.I.R*, 140 T.C. 200, 206 (2013) ("ultimately it is the Internal Revenue Code and not [s]tate court orders that determine one's eligibility to claim a deduction for [f]ederal income tax purposes"); *Lowe* v. *Commissioner of Internal Revenue*, T. C. Memo 2016-206, pp. 7–8, 112 T.C.M. (CCH) 514 (T.C. 2016) ("as we have consistently held, a taxpayer's eligibility for deductions is determined under [f]ederal law—specifically, the express terms of the Internal Revenue Code—and [s]tate courts cannot bind the Commissioner [of Internal Revenue] to any particular treatment of a taxpayer").

The claim that we have determined was preserved for our review is more narrow, however. That claim concerns whether the court should have entered orders that preserved for the defendant the ability to enjoy the benefits of the agreement to the extent permissible under the laws of the jurisdiction governing his income tax obligations. We agree with the defendant that the trial court's orders appear to preclude him from doing so.

The order at issue simply states, without reference to the parties' agreement, that "alimony shall be nontaxable to the plaintiff and nondeductible to the defendant." We presume, and on appeal the plaintiff contends, that the trial court entered this order to make it clear that the parties' respective tax obligations are to be governed by the recently enacted federal tax laws,

not the conflicting provisions of the agreement. As written, however, the court's order would prevent the defendant from exercising his contractual right to deduct alimony payments in accordance with the agreement even if his income tax obligations are governed by the laws of a jurisdiction that would otherwise permit such deductions and even if federal tax laws are amended in the future to permit such deductions. The court provided no justification for that result, and we suspect that it did not intend to issue orders having that effect.

Accordingly, we conclude that the court improperly ordered that the defendant may not, under any circumstances, deduct alimony payments from his income for tax purposes. We, therefore, reverse the judgment of the court as to tax deductibility and remand the case with direction to enter a new order that the provision of the agreement as to deductibility shall apply so long as it does not conflict with the controlling law of any jurisdiction in which the parties file tax returns.[7]

III

The defendant's final claim is that the court abused its discretion and denied him due process of law by arbitrarily denying his motion for a continuance to

[7] We further conclude that the order at issue is severable and does not require reconsideration of the court's other financial orders on remand. "A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order is severable if its impropriety does not place the correctness of the other orders in question." (Internal quotation marks omitted.) *Tuckman* v. *Tuckman*, 308 Conn. 194, 214, 61 A.3d 449 (2013). In the present case, the court's order precluding the defendant from deducting alimony payments from his taxable income, even if doing so is or becomes permissible under the laws of the jurisdiction governing his income tax obligations, is wholly independent of the court's other financial orders. Under the circumstances of this case, preserving for the defendant the *possibility* of deducting from his income the amount of alimony payments he makes has no bearing on the other financial orders the court issued and does not place the correctness of those orders in question.

secure new counsel after his attorney withdrew from the case. We are not persuaded.

As an initial matter, we note that the defendant did not assert a constitutional claim before the trial court and does not seek review of such a claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 188 (2015). Rather, the defendant frames the issue in his brief as whether the court abused its discretion. As a result, we employ the abuse of discretion standard in reviewing the court's refusal to grant his motion for a continuance. See *Watrous* v. *Watrous*, 108 Conn. App. 813, 826–27, 949 A.2d 557 (2008) (citing *Kelly* v. *Kelly*, 85 Conn. App. 794, 799, 859 A.2d 60 (2004)).

"Decisions to grant or to deny continuances are very often matters involving judicial economy, docket management or courtroom proceedings and, therefore, are particularly within the province of a trial court. . . . Whether to grant or to deny such motions clearly involves discretion, and a reviewing court should not disturb those decisions, unless there has been an abuse of that discretion, absent a showing that a specific constitutional right would be infringed. . . .

"Our Supreme Court has articulated a number of factors that appropriately may enter into an appellate court's review of a trial court's exercise of its discretion in denying a motion for a continuance. Although resistant to precise cataloguing, such factors revolve around the circumstances before the trial court at the time it rendered its decision, including: the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court;

the perceived legitimacy of the reasons proffered in support of the request; [and] the [party's] personal responsibility for the timing of the request . . . ." (Citation omitted; internal quotation marks omitted.) *Kelly* v. *Kelly*, supra, 85 Conn. App. 800.

"In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis." (Internal quotation marks omitted.) *Boccanfuso* v. *Daghoghi*, 193 Conn. App. 137, 169, 219 A.3d 400 (2019), aff'd, 337 Conn. 228, 253 A.3d 1 (2020). "[I]n order to establish reversible error in nonconstitutional claims, the [appellant] must prove both an abuse of discretion and harm . . . ." (Internal quotation marks omitted.) *Cunniffe* v. *Cunniffe*, 141 Conn. App. 227, 235, 60 A.3d 1051, cert. denied, 308 Conn. 934, 66 A.3d 497 (2013).

The record reveals that the defendant was represented by counsel in this action from May 8, 2017, until February 14, 2019, when his first attorney filed a motion to withdraw her appearance because the attorney-client relationship had broken down irreparably.[8] The defendant subsequently secured new counsel, who filed an appearance on February 25, 2019. On May 7, 2019, less than one week before trial was scheduled to begin, the defendant's second attorney filed a motion to withdraw in which he, too, cited a breakdown in the attorney-client relationship and further stated that withdrawal was necessary in order to comply with the Rules of Professional Conduct.

At the time that the second attorney moved to withdraw from the case, he also moved for a continuance to afford the defendant additional time to secure replacement counsel. The next day, however, the defendant filed an appearance as a self-represented party.

[8] The hearing on the motion to withdraw was scheduled for February 28, 2019. It was marked off by the court because the parties failed to appear.

The court issued a written order denying the request for a continuance, noting that trial was scheduled to commence the following Monday.[9] Trial commenced on May 13, 2019. Prior to the start of evidence, the defendant renewed his request for a continuance by way of an oral motion to the court on the grounds that he had been unsuccessful in securing new counsel and that he could not adequately represent his interests in the proceedings. When the court inquired as to the length of delay the defendant sought, the defendant responded that one attorney with whom he had spoken indicated needing at least three months to prepare for trial.

The court then heard from the plaintiff's counsel, who opposed any continuance of the trial. Counsel noted that the dissolution action had been filed more than two years earlier, had been litigated extensively during that time, and that the parties had been ready to proceed to trial six months earlier when the matter was postponed by the court. He also argued that the plaintiff would be prejudiced by any further delay because the defendant had accrued a substantial alimony arrearage and there was an outstanding motion for child support, pendente lite, which had been filed on May 26, 2017. The plaintiff's counsel further represented that the defendant had not been providing adequate child support and that out-of-pocket medical expenses, medical insurance, and fees for the children's extracurricular activities had gone unpaid.

After hearing from both parties, the court denied the defendant's motion for a continuance, stating: "Well . . . the national goal for dealing with cases involving divorce, certainly with children, is to resolve the matter

[9] A hearing regarding the motion to withdraw was scheduled to occur on May 10, 2019. The hearing on that motion was marked off after the defendant filed an appearance as a self-represented party.

within twelve months. Your case is some . . . 720 days past the return date. This is a matter that's been docketed for a considerable period of time. . . . [Y]our oral motion for continuance is . . . denied. We'll go forward. The [c]ourt will give you what latitude it can, but self-represented parties are required to follow the same rules and Practice Book obligations as . . . a licensed attorney." The case proceeded to trial with the defendant acting in a self-represented capacity. After the close of evidence but before the court rendered judgment, the defendant secured new counsel, who appeared and filed a posttrial brief on his behalf.

On the basis of our review of the entire record and the factors articulated by our Supreme Court; see *State* v. *Rivera*, 268 Conn. 351, 379, 844 A.2d 191 (2004); we conclude that the court did not abuse its discretion when it denied the defendant's motion for a continuance. At the time of trial, this action had been pending for more than two years and had been heavily litigated. In his oral motion for a continuance on the first day of trial, the defendant informed the court that he might need a continuance of up to three months.

In deciding whether to grant the continuance, the court properly balanced the parties' competing interests. The court reasonably concluded that the plaintiff's interest in a prompt and final resolution of the matter outweighed any prejudice the defendant might experience if he was required to proceed as a self-represented party. That conclusion was neither arbitrary nor unreasonable, especially in light of the fact that two attorneys representing the defendant had withdrawn on the ground of a breakdown in the attorney-client relationship. Under such circumstances, it was not unreasonable for the court to conclude that granting a continuance on the eve of trial could have resulted in a prolonged delay in a matter involving the well-being of minor children. See, e.g., *Vossbrinck* v. *Vossbrinck*, 194

Conn. 229, 230–32, 478 A.2d 1011 (1984), cert. denied, 471 U.S. 1020, 105 S. Ct. 2048, 85 L. Ed. 2d 311 (1985) (court did not abuse its discretion in denying motion for continuance after granting attorney's motion to withdraw based on disagreements between defendant and counsel about how case should be litigated); *Bevilacqua* v. *Bevilacqua*, 201 Conn. App. 261, 266–69, 242 A.3d 542 (2020) (court did not abuse its discretion in denying motion for continuance in dissolution action involving children that had been pending for more than two years even though delays had been outside of parties' control); see also *Thode* v. *Thode*, 190 Conn. 694, 697, 462 A.2d 4 (1983) (court was "especially hesitant to find an abuse of discretion where the [trial] court ha[d] denied a motion for continuance made on the day of trial"); *Day* v. *Commissioner of Correction*, 118 Conn. App. 130, 134, 983 A.2d 869 (2009) (court did not abuse its discretion when it denied motion for continuance on first day of trial), cert. denied, 294 Conn. 930, 986 A.2d 1055 (2010).

Accordingly, we conclude that the defendant has failed to demonstrate that the court abused its discretion when it denied his motion for a continuance.[10]

[10] Because we conclude that the court did not abuse its discretion, it is unnecessary to consider whether its denial of the motion for a continuance was harmless error. We note, however, that the record provides little support for the defendant's claim that he was prejudiced at all, much less to an extent that would require reversal. The court was extremely accommodating toward the defendant at trial. During the course of the trial, the court patiently explained procedural matters and granted the defendant several lengthy recesses to prepare. It permitted the defendant to submit filings after the deadlines for doing so had passed and gave wide latitude to the defendant during his own direct testimony and cross-examination of the plaintiff. Nearly all of the exhibits the defendant offered into evidence were admitted as full exhibits. Perhaps most significantly, after the close of evidence, the defendant secured counsel, who raised issues and made legal arguments in a posttrial brief that was filed on his behalf. Although the defendant makes a number of arguments about how he was prejudiced by virtue of having to proceed as a self-represented party at trial, his attempts to demonstrate how or to what extent his self-represented status caused any of those alleged harms are unpersuasive.

The judgment is reversed only as to the order regarding the tax consequences of alimony payments, and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

KRIS J. LIPPI ET AL. *v.* UNITED SERVICES AUTOMOBILE ASSOCIATION
(AC 43470)

Alvord, Alexander and Bishop, Js.

Syllabus

The plaintiffs sought to recover damages from the defendant insurance company, alleging that the defendant breached a homeowners insurance policy that insured their residential property. The policy excluded coverage for "collapse," except as specifically provided for in the policy, which defined "collapse" as, inter alia, a "sudden falling or caving in" of a building. The plaintiffs discovered cracks in the walls of their basement, and filed a claim for coverage with the defendant. A contractor inspected the cracks and stated that they appeared similar to the cracks associated with the deterioration of concrete caused by the presence of a chemical compound, pyrrhotite, in the mixture used to make the concrete walls. The defendant denied coverage on the basis of a provision of the policy excluding coverage for, inter alia, cracking of walls, floors, roofs or ceilings. The plaintiffs alleged that the defendant breached the policy by denying coverage for the cracks in the basement walls under the collapse provision of the policy. The defendant filed a motion for summary judgment, arguing that the plaintiffs demonstrated no evidence of collapse under the policy. The trial court granted the defendant's motion for summary judgment, concluding that the plaintiffs could not demonstrate that the damage to their property constituted a sudden "caving in," and, therefore, concluded that the defendant had not breached its contract with the plaintiffs. From the judgment rendered thereon, the plaintiffs appealed to this court. *Held*:

1. The plaintiffs could not prevail on their claim that the trial court erred in concluding that there was no genuine issue of material fact as to whether they were entitled to coverage under their homeowners insurance policy because their property did not suffer a collapse as defined in the policy, which was based on their claim that the trial court improperly interpreted the phrase "caving in": the phrase "caving in" was not ambiguous, the only damage alleged by the plaintiffs was the appearance of

cracks in their basement walls, and, although the plaintiffs argued that the term "caving in" can mean that the basement walls have yielded to the internal force of the oxidation of pyrrhotite, this was just an alternative description of the cracks, thus, the mere cracks in the walls of the plaintiffs' basement, in the absence of any evidence of displacement, shifting or bowing of the walls, could not be understood to be included under the policy's definition of "collapse" as a "caving in"; moreover, the meaning of the word "sudden" as used in the context of the collapse provision could not be construed to encompass the gradual nature of the cracking that had occurred to the walls of the plaintiffs' basement.

2. The trial court applied the correct standard in granting the defendant's motion for summary judgment: although the plaintiffs claimed that the court improperly shifted the burden to them and that the defendant offered no evidence demonstrating that their home had not caved in, the court found that the defendant provided evidence that the house had not fallen or caved in, was safe to live in, and that the damage occurred over a long period of time, and the plaintiffs failed to recite specific facts that contradicted those provided by the defendant's evidence because they did not allege or provide any evidence that the damage to the walls constituted more than mere cracking.

Argued September 22—officially released December 28, 2021

Procedural History

Action seeking to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Tolland, where the court, *Farley*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Jeffrey R. Lindequist, for the appellants (plaintiffs).

Theodore C. Schultz, pro hac vice, with whom were *Alice M. Forbes*, pro hac vice, and *William J. Forbes*, for the appellee (defendant).

Opinion

ALEXANDER, J. The plaintiffs, Kris J. Lippi and Gina M. Lippi, appeal from the trial court's rendering of summary judgment in favor of the defendant, United Services Automobile Association, on the plaintiffs' two

count complaint that alleged breach of an insurance policy and extracontractual claims. On appeal, the plaintiffs claim that the court erred by improperly granting the defendant's motion for summary judgment. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The plaintiffs purchased residential property at 46 Ellsworth Circle in South Windsor in 2010. The house on this property was built in 1998. The plaintiffs have maintained a homeowners insurance policy on the property with the defendant from the time they purchased the property.

The policy provides coverage for direct, physical loss to the covered property, unless excluded in "SECTION I—LOSSES WE DO NOT COVER." The exclusions include "[s]ettling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings . . . ." These exclusions apply to the "ADDITIONAL COVERAGES" provision of the policy by endorsement. The policy does not insure for damages consisting or caused, directly or indirectly, by "collapse," other than as provided under the "ADDITIONAL COVERAGES" provision. (Internal quotation marks omitted.) The "ADDITIONAL COVERAGES" provision provides in relevant part: "8. 'Collapse' For an entire building or any part of a building covered by this insurance we insure for direct physical loss to covered property involving 'collapse' of a building or any part of a building only when the 'collapse' is caused by one or more of the following: a. 'Named peril(s)' apply to covered buildings and personal property for loss insured by this additional coverage. b. Decay that is hidden from view, meaning damage that is unknown prior to collapse or that does not result from a failure to reasonably maintain the property . . . f. Use of

defective material or methods in construction, remodeling or renovation . . . .'' (Emphasis omitted.) The policy defines ''collapse'' as ''a. A sudden falling or caving in; or b. A sudden breaking apart or deformation such that the building or part of a building is in imminent peril of falling or caving in and is not fit for its intended use.'' (Internal quotation marks omitted.) Thus, the policy excludes coverage for ''collapse,'' except as provided by the ''ADDITIONAL COVERAGES'' provision and subject to the exclusions described under ''LOSSES WE DO NOT COVER,'' with ''collapse'' defined under the policy's ''DEFINITIONS'' section, as amended by endorsement. (Internal quotation marks omitted.)

In 2016, the plaintiffs discovered cracks in the walls of their basement. A contractor inspected the cracks and stated that they appeared similar to the cracks associated with the deterioration of concrete caused by the presence of a chemical compound, pyrrhotite, in the mixture used to make the concrete walls. The plaintiffs learned that their basement walls likely were constructed with concrete that contained pyrrhotite and was manufactured by the J.J. Mottes Concrete Company. The plaintiffs filed a claim for coverage with the defendant, which the defendant denied on the basis of the ''LOSSES WE DO NOT COVER'' provision that excludes coverage for ''[s]ettling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings . . . .''

The plaintiffs commenced this action in July, 2016, claiming that the defendant breached the homeowners insurance policy that it had issued to them by denying coverage for cracks in the walls of their basement under the collapse provision of the policy. Thereafter, the plaintiffs had the property inspected by two engineers, James L. Silva and David Grandprè. Silva stated that the cracking ''appears to be consistent with the conditions that are usually observed after the incipient stage

of a concrete sulfate attack . . . .'' (Emphasis omitted.) He further explained that ''the immediate replacement of the foundation is not warranted'' but that ''the rate of damage can accelerate and a foundation replacement could likely be required within the next two to five years.'' (Emphasis omitted.) Grandprè stated that the property was not unsafe to live in and he could not say when, or if, the walls would ever need to be replaced. He did not observe any shifting, bowing or other displacement of the walls or other structural elements. The plaintiffs have continued to reside at the property and stated that they feel safe living there.

In April, 2019, the defendant filed a motion for summary judgment maintaining that ''the [plaintiffs] have no evidence of collapse under the policy . . . . The [plaintiffs'] own expert admits the [plaintiffs'] foundation does not need replacement now, and may never need replacing in the future . . . . Furthermore, the [plaintiffs'] policy does not cover losses that happen over time, such as pyrrhotite degradation in concrete.'' The plaintiffs countered in their opposition to the defendant's motion that ''the record suggests that [the plaintiffs] have suffered a collapse of the basement walls of their home, as defined by the terms of one or more of the policies issued by the defendant, which collapse was caused by an enumerated peril. To the extent that the record does not clearly demonstrate such a covered collapse, or the timing thereof, this lack of clarity arises from factual issues that preclude summary judgment.'' After oral argument, and in a written decision, the court granted the defendant's motion for summary judgment.

In its decision, the court discussed the definition of ''collapse'' as it applied to the ''collapse'' coverage contained within the policy issued by the defendant to the plaintiffs. (Internal quotation marks omitted.) The court noted that the policy defines ''[c]ollapse'' as ''a. A sudden falling or caving in; or b. A sudden breaking apart

or deformation such that the building or part of a building is in imminent peril of falling or caving in and is not fit for its intended use." The court also noted the policy's exclusion for "[s]ettling, *cracking*, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs, or ceilings." (Emphasis added.) The court concluded that the plaintiffs could not establish that the damage to their property constituted a "sudden . . . caving in" and, therefore, the defendant had not breached its contract with the plaintiffs. (Internal quotation marks omitted.)

The court determined that "[t]he facts of this case do not raise a jury question as to whether the plaintiffs' basement walls have experienced a caving in. There is no evidence of any displacement, shifting or bowing of [the] walls. There is only evidence of cracking resulting from the internal pressure caused by the chemical reaction the plaintiffs maintain is occurring. . . . Moreover, the evidence in this case places the damage to the plaintiff's basement walls squarely within the scope of the cracking exclusion recited above.

"Further, in order for the plaintiffs to establish coverage, any caving in must have occurred suddenly, i.e., abruptly. A gradual loss of strength, even where it does include a gradual succumbing to external forces, is not sudden. While there is evidence that the basement walls have experienced a gradual loss of strength, the record evidence only supports a conclusion that it has been a gradual process. Damage that occurs gradually over time does not satisfy the requirement that any caving in must be sudden." The court then concluded that the plaintiffs' extracontractual claims were not viable.

On appeal, the plaintiffs claim that the trial court erred in granting the defendant's motion for summary judgment. Specifically, the plaintiffs contend that the trial court erred by (1) concluding that the plaintiffs'

property did not suffer a collapse as defined in the policy issued by the defendant because there existed a genuine issue of material fact as to whether the damage to the property constituted a "sudden . . . caving in," and (2) failing to apply the correct standard in granting the defendant's motion for summary judgment.[1] (Internal quotation marks omitted.) We disagree and, accordingly, affirm the judgment of the trial court.

We first set forth the applicable standard of review. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . Our review of the trial court's decision to grant . . . summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Warzecha* v. *USAA Casualty Ins. Co.*, 206 Conn. App. 188, 190–91, 259 A.3d 1251 (2021).

"[C]onstruction of a contract of insurance presents a question of law for the [trial] court which this court

[1] The plaintiffs also claim that the court erred in rendering summary judgment in favor of the defendants on their extracontractual claims. Because we conclude that the trial court properly granted the defendant's motion for summary judgment as to the breach of contract claim, the plaintiffs' extracontractual claims also fail. See, e.g., *Zulick* v. *Patrons Mutual Ins. Co.*, 287 Conn. 367, 378, 949 A.2d 1084 (2008) (trial court's rendering of summary judgment in favor of defendant on breach of contract claim was proper, therefore, there was no genuine issue of material fact as to whether application of policy constituted violation of extracontractual claims).

reviews de novo." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Hartford Accident & Indemnity Co.*, 333 Conn. 343, 364, 216 A.3d 629 (2019). "An insurance policy is to be interpreted by the same general rules that govern the construction of any written contract . . . . In accordance with those principles, [t]he determinative question is the intent of the parties, that is, what coverage the . . . [insured] expected to receive and what the [insurer] was to provide, as disclosed by the provisions of the policy. . . . If the terms of the policy are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning. . . . Under those circumstances, the policy is to be given effect according to its terms. . . . When interpreting [an insurance policy], we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result. . . .

"In determining whether the terms of an insurance policy are clear and unambiguous, [a] court will not torture words to import ambiguity [when] the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . As with contracts generally, a provision in an insurance policy is ambiguous when it is reasonably susceptible to more than one reading. . . . Under those circumstances, any ambiguity in the terms of an insurance policy must be construed in favor of the insured because the insurance company drafted the policy." (Internal quotation marks omitted.) *Jemiola* v. *Hartford Casualty Ins. Co.*, 335 Conn. 117, 128–29, 229 A.3d 84 (2019).

In *Jemiola*, the plaintiff commenced an action against the defendant insurance company, claiming that cracks

in the basement walls of the plaintiff's home were covered under the collapse provision of her homeowners insurance policy. Id., 119. The trial court granted the defendant's motion for summary judgment and, on appeal, our Supreme Court affirmed the trial court's judgment. Id., 119–20. The definition of collapse in that policy was "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its current intended purpose." (Internal quotation marks omitted.) Id., 121. The court concluded that there was no plausible interpretation of the policy's definition of "collapse" that "reasonably encompasses a home, such as the plaintiff's, that is still standing and capable of being safely lived in for many years—if not decades—to come." Id., 135. Additionally, the court concluded that the plaintiff's reliance in *Jemiola* on cases with materially different facts was misplaced, because "[c]ontext is . . . central to the way in which policy language is applied; the same language may be found both ambiguous and unambiguous as applied to different facts. . . . Language in an insurance contract, therefore, must be construed in the circumstances of [a particular] case, and cannot be found to be ambiguous [or unambiguous] in the abstract. . . . [O]ne court's determination that [a] term . . . was unambiguous, in the specific context of the case that was before it, is not dispositive of whether the term is clear in the context of a wholly different matter." (Internal quotation marks omitted.) Id., 134.

I

The plaintiffs first argue that the court erred when it concluded that there was no genuine issue of material fact as to whether they were entitled to coverage under the insurance policy issued by the defendant. They contend that the trial court's interpretation of the phrase "sudden falling or caving in" was in error because it

"failed to construe the ambiguities in favor of the plaintiffs . . . ." (Internal quotation marks omitted.) They argue that the term "cave in" can reasonably be defined as to "yield" or to "submit to pressure" and that the basement walls of the property have yielded to the chemical reaction in the concrete. (Internal quotation marks omitted.) However, we will not construe words in a contract to import ambiguity when an ambiguity is not present. See *Jemiola* v. *Hartford Casualty Ins. Co.*, supra, 335 Conn. 129. In this context, we do not conclude that the phrase "caving in" is ambiguous.

In support of their argument, the plaintiffs cite multiple cases that can be distinguished from the circumstances of the present case. In *Sirois* v. *USAA Casualty Ins. Co.*, 342 F. Supp. 3d 235, 241–42 (D. Conn. 2018), the United States District Court for the District of Connecticut, in interpreting the same policy language as that which is at issue in the present case, denied the defendant insurance company's motion for summary judgment after finding that the phrase "caving in" was ambiguous. (Internal quotation marks omitted.) The court stated that the plaintiffs' proposed meaning, "yield" or to "submit to pressure," was a reasonable interpretation. (Internal quotation marks omitted.) Id., 242. In that case, however, the plaintiffs alleged in their complaint that the basement walls of their home had "a series of horizontal and vertical cracks" and that they had begun to show signs of "bowing, bulging, jacking, shifting, and other instances of differential inward and upward motion." (Internal quotation marks omitted.) *Sirois* v. *USAA Casualty Ins. Co.*, United States District Court, Docket No. 3:16-CV-1172 (MPS) (D. Conn. August 29, 2017) (prior decision denying defendant's motion to dismiss).

In *Gnann* v. *United Services Automobile Assn.*, Superior Court, judicial district of Tolland, Docket No. CV-16-6010517-S (July 11, 2019) (68 Conn. L. Rptr. 882, 890),

the court, also interpreting the same policy language as that which is at issue in the present case, denied the defendant insurance company's motion for summary judgment, finding that there was a genuine issue of material fact as to whether the damage to the plaintiff's basement walls constituted a " 'caving in.' " The plaintiffs in that case alleged that there were large cracks in their basement walls, loose pieces of concrete that could be removed from the walls, and the deterioration had "resulted in the bulging, bowing and shifting of the walls" and further, that these conditions "are evidence that the concrete basement walls have failed and have begun to move inward . . . ." (Internal quotation marks omitted.) Id., 883. On the basis of these facts, the court found the phrase " 'caving in' " to be ambiguous and concluded that there was a genuine issue of material fact as to whether the damage constituted " 'caving in . . . .' " Id., 890.

Turning to the present case and considering the evidence in the light most favorable to the plaintiffs as the nonmoving parties, the facts of this case can be distinguished from both *Sirois* and *Gnann* because the only damage alleged by the plaintiffs is the appearance of cracks in their basement walls. Although the plaintiffs contend that the term "caving in" can mean that the "basement walls have *yielded* to the internal force of the expansive oxidation of pyrrhotite," this is just an alternative description of the cracks in the walls of their basement. (Emphasis in original; internal quotation marks omitted.) On the basis of the facts and circumstances of the present case, the mere cracks in the walls of the plaintiffs' basement, in the absence of any evidence of displacement, shifting or bowing of the walls, cannot be understood to be included under the policy's definition of "collapse" as a "caving in . . . ." See *Jemiola* v. *Hartford Casualty Ins. Co.*, supra, 335 Conn. 134.

Next, the plaintiffs contend that the term "sudden" must be construed to mean "unexpected" or, in the alternative, that the word "sudden" is ambiguous and should be construed in favor of the insured.[2] (Internal quotation marks omitted.) We disagree. In *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 540, 791 A.2d 489 (2002) (*Buell*), our Supreme Court interpreted the word "sudden" in an insurance policy to mean "temporally abrupt . . . ." The policy at issue in that case excluded pollution related claims from coverage but contained an exception to the pollution exclusion reinstating coverage when the release of pollutants was " 'sudden and accidental.' " Id., 534. The plaintiff argued that although the pollution occurred over a period of years, the exception to the pollution exclusion should apply because the term " 'sudden' " meant "unexpected . . . ." Id., 536. The court stated that the word "sudden" generally described the unexpected nature of an event but is also used to describe a situation that is abrupt or quickly occurring. Id., 540. It explained that the word "sudden" may "connote either state—or even a combination of both an unexpected and a temporally abrupt quality—in a given context, [but] what matters for our purposes is what the word was intended to mean in the context of the 'sudden and accidental' exception to the pollution exclusion." Id. Within the context of that policy, and

[2] The plaintiffs also argue that the defendant's interpretation of "sudden" as meaning "temporally abrupt" would render coverage illusory. Specifically, they contend that requiring the insured to wait for a catastrophic event to occur, such as a complete falling to the ground of their home, "defies the reasonable expectations of the insured and serves only to render the collapse coverage illusory." We disagree that the coverage provided by the defendant is illusory. The policy's definition of "collapse" provides coverage before a complete falling to the ground of a home, such as when "a building is in imminent peril of falling or caving in and is not fit for its intended use." (Internal quotation marks omitted.) Coverage is not rendered illusory merely because the policy's definition of collapse does not encompass the damage to the plaintiffs' basement walls.

due to "the juxtaposition of the word 'sudden' with the word 'accidental,' " the court concluded that the definition of "sudden" included the phrase "temporally abrupt . . . ." Id.

We conclude that the meaning of the word "sudden" as used in the context of the collapse provision of the policy in the present case includes the "temporally abrupt" quality of the word. Although the language in the present case does not use the phrase "sudden and accidental," we conclude that our Supreme Court's reasoning in *Buell* and *Jemiola* is instructive. In both cases, the court emphasized the importance of interpreting words in the context of the policy at issue and the facts of the case. See *Jemiola* v. *Hartford Casualty Ins. Co.*, supra, 335 Conn. 134; *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, supra, 259 Conn. 540. Furthermore, although the plaintiffs cite to dictionary definitions of "sudden" in support of their argument that "sudden" is an ambiguous term, "[t]he existence of more than one dictionary definition is not the sine qua non of ambiguity." (Internal quotation marks omitted.) *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, supra, 546. It is untenable to construe the word "sudden" "as an event whose only requirement is that it be unexpected to the observer." (Internal quotation marks omitted.) Id., 544. "A provision in an insurance policy is ambiguous only when it is *reasonably* susceptible of more than one reading"; (emphasis in original) *Jemiola* v. *Hartford Casualty Ins. Co.*, supra, 135; and, here, the word sudden cannot be susceptible to the meaning the plaintiffs ask us to ascribe to it. Here, as the trial court noted, the cracks in the walls of the plaintiffs' basement have occurred gradually over time, and, as we noted earlier in this opinion, the cracks do not constitute a " 'caving in . . . .' " In the context of this case, therefore, the word "sudden" cannot be construed to encompass the gradual nature of the cracking

that has occurred in the walls of the plaintiffs' basement. Thus, the trial court correctly concluded that there was no genuine issue of material fact as to whether the cracks in the walls of the plaintiffs' basement constituted a " 'sudden . . . caving in . . . .' "

II

The plaintiffs next claim that the trial court failed to apply the correct standard in granting the defendant's motion for summary judgment. Specifically, they contend that the court improperly shifted the burden to them, and that the defendant "offered no evidence that affirmatively demonstrated that the [plaintiffs'] home had not caved in." We conclude that the trial court applied the correct standard in granting the defendant's motion for summary judgment.

The general principles governing a trial court's decision on a motion for summary judgment are well established. "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met

its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue." (Internal quotation marks omitted.) *Romprey* v. *Safeco Ins. Co. of America*, 310 Conn. 304, 319–20, 77 A.3d 726 (2013). "To oppose a motion for summary judgment successfully, the nonmovant must recite specific facts . . . which contradict those stated in the movant's affidavits and documents. . . . The opposing party to a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Brusby* v. *Metropolitan District*, 160 Conn. App. 638, 646, 127 A.3d 257 (2015).

In their complaint, the plaintiffs alleged that the "pattern cracking" damage to their basement walls constituted a " 'collapse' " and was covered under the collapse provision of the policy. In its motion for summary judgment, the defendant argued that there was no genuine issue of material fact as to whether the damage to the plaintiffs' basement walls constituted a "collapse" as defined in the policy. First, the defendant argued that the "slow degradation of concrete that took years to develop" could not constitute a " 'sudden' " collapse, as that term is used in the policy's definition of collapse. In support of its argument, the defendant provided evidence in the form of statements from the plaintiffs' engineers, Silva and Grandprè, as well as its own engineer, Joseph Malo, all of whom inspected the property and stated that the chemical reaction occurring within the basement walls was slow and took place over a long period of time.

The defendant also argued that the plaintiffs could not show that the damage constituted a " 'collapse' " because the house had not collapsed, fallen down or caved in, and it was safe to live in. The defendant pointed again to Silva's and Grandprè's statements that

replacement of the plaintiffs' foundation was not warranted at that time and that the plaintiffs' house may never fall down. In addition, the defendant referred to Grandprè's statements that the plaintiffs' basement walls were plumb, the cracks were generally smaller than he had seen in other residences, the home was safe to live in, and the foundation was able to support the load of the house above and was able to keep out soil and water.

In their objection to the defendant's motion, the plaintiffs offered an interpretation of the policy language at issue suggesting that the mere cracks in the basement walls constituted a "collapse" as defined in the homeowners policy. The plaintiffs argued that the damage constituted a "caving in" because that phrase is defined as to " 'yield' " or to " 'submit to pressure' " and pointed to Grandprè's statement that the basement walls had yielded to the internal force of the chemical reaction in the concrete. The plaintiffs further argued that the word " 'sudden' " was ambiguous and should be construed in their favor to mean " 'unexpected,' " and that "it is only reasonable to conclude that the chemical reaction at work in [the plaintiffs'] walls was completely unexpected."

The trial court construed the language at issue in the policy and concluded that, based on the facts of the case, there was no genuine issue of material fact as to whether the damage to the plaintiffs' home constituted a " 'collapse' " such that it would be covered under the collapse provision of the policy. The court concluded that the defendant met its burden of establishing that there was no genuine issue of material fact by providing evidence that the house had not fallen or caved in, was safe to live in, and that the damage occurred over a period of time. The plaintiffs argued in their opposition that the cracking, in and of itself, constituted a "caving in" because that phrase should be interpreted to mean

to " 'yield' " or to " 'submit to pressure' " and that the term " 'sudden' " means " 'unexpected' " and that the cracking occurred unexpectedly. The court, however, found that there was "no evidence of any displacement, shifting or bowing of walls. . . . There is no evidence that any loss of strength associated with the cracking has undermined the structural integrity of the building or part of it such that a part of the building has actually given way to external forces." Therefore, the plaintiffs failed to recite specific facts that contradicted those provided by the defendant's evidence because they did not allege or provide any evidence that the damage to the walls of their basement constituted more than mere cracking. See, e.g., *Brusby* v. *Metropolitan District*, supra, 160 Conn. App. 646. The court concluded that, even when construing the facts in the light most favorable to the plaintiffs, the mere cracking in the basement walls of the plaintiffs' home could not support a finding that the plaintiffs' home suffered a "collapse" as defined in the policy.

Therefore, we conclude that the plaintiffs failed to show that a genuine issue of material fact existed as to whether the damage to their property constituted a "collapse" as covered under the insurance policy provided by the defendant. Accordingly, the trial court did not err in rendering summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

JEREMY M. REID *v.* SHERI A. SPEER ET AL.
(AC 36663)

Alexander, Clark and Palmer, Js.

Syllabus

The defendant employer appealed to this court from the decision of the Compensation Review Board, which affirmed the decision of the Workers' Compensation Commissioner finding that the plaintiff was employed

by the defendant within the meaning of the Workers' Compensation Act (act) (§ 31-275 et seq.) and granting the plaintiff's motion to preclude the defendant from contesting the compensability of his injury pursuant to statute (§ 31-294c (b)). The defendant received the plaintiff's notice of claim for compensation but failed to file a form 43 within twenty-eight days contesting liability for the plaintiff's injury. On appeal, the defendant claimed, inter alia, that filing a form 43 would have violated the applicable statute (§ 31-290c), as she had knowledge that the plaintiff's claim for compensation was fraudulent. *Held* that the defendant could not prevail on her challenges to the fact-finding and credibility determinations made by the commissioner: evidence in the record supported the commissioner's express findings that the alleged injury suffered by the plaintiff, if proven, would constitute a compensable injury under the act and that, at the time of the alleged injury, the plaintiff was an employee of the defendant; moreover, the defendant could not prevail on her claim that her filing of a form 43 would have constituted criminal conduct, as she provided no legal support for the claim, and the purpose of filing the form, to contest the defendant's liability for the plaintiff's injury, would not fall within the language of § 31-290c that criminalizes conduct by a claimant for benefits under the act.

Submitted on briefs November 10, 2021—officially released December 28, 2021

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Second District finding that the plaintiff was an employee of the named defendant subject to coverage under the Workers' Compensation Act and granting the plaintiff's motion to preclude the defendants from contesting liability as to his claim for certain workers' compensation benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the named defendant appealed to this court. *Affirmed.*

Sheri A. Speer, self-represented, filed a brief as the appellant (named defendant).

Lance G. Proctor, filed a brief for the appellee (plaintiff).

PER CURIAM. The self-represented defendant Sheri A. Speer appeals from the decision of the Compensation Review Board (board) affirming the finding and award of preclusion rendered by the Workers' Compensation Commissioner for the Second District (commissioner), in favor of the plaintiff, Jeremy M. Reid.[1] On appeal, the defendant challenges several of the commissioner's findings and also claims that filing a form 43 to contest liability for the plaintiff's injury would have constituted a criminal act punishable pursuant to General Statutes § 31-290c, due to her alleged knowledge that his claim was fraudulent. We affirm the decision of the board.[2]

The following facts and procedural history are relevant to this appeal. The plaintiff filed a form 30C on

[1] General Statutes § 31-301b provides that "[a]ny party aggrieved by the decision of the Compensation Review Board upon any question or questions of law arising in the proceedings may appeal the decision of the Compensation Review Board to the Appellate Court, whether or not the decision is a final decision within the meaning of section 4-183 or a final judgment within the meaning of section 52-263." Our appellate courts expressly have recognized that the final judgment requirement does not apply to appeals taken from the board. See *Dechio* v. *Raymark Industries, Inc.*, 299 Conn. 376, 399–400, 10 A.3d 20 (2010); *Hadden* v. *Capital Region Education Council*, 164 Conn. App. 41, 46 n.7, 137 A.3d 775 (2016).

[2] The plaintiff named Sheri A. Speer and Speer Enterprises, LLC, as his employer when he commenced this claim for workers' compensation benefits. During the proceedings before the commissioner and the board, the name of the employer was changed to "Sheri A. Speer d/b/a Speer Enterprises, LLC." The commissioner found that Sheri A. Speer was an employer for purposes of the Workers' Compensation Act, and that "[a]ll of [the plaintiff's] duties for [the defendant] and/or Speer Enterprises were performed within the state of Connecticut." All references herein to the defendant are to Sheri A. Speer.

Additionally, the commissioner found that the defendant did not carry workers' compensation insurance either individually or in the name of any of her businesses. The Second Injury Fund (fund) was cited in as a party pursuant to General Statutes § 31-355. See, e.g., *DeJesus* v. *R.P.M. Enterprises, Inc.*, 204 Conn. App. 665, 668, 255 A.3d 885 (2021). The fund has not participated in this appeal.

May 5, 2010, alleging that he had sustained a compensable injury to his right shoulder while employed by the defendant.[3] This injury allegedly had occurred on December 31, 2009, when he had been shoveling snow at one of the defendant's properties. The defendant did not respond to the plaintiff's filing in any manner, including the filing of a form 43 within twenty-eight days.[4] On August 20, 2010, the plaintiff filed a motion to preclude the defendant from contesting liability.[5]

After informal and formal hearings, the commissioner determined that, although the plaintiff initially had been an independent contractor, the relationship between the plaintiff and the defendant had evolved into one of an employee-employer. The plaintiff's alleged injury, therefore, fell within scope of the Workers' Compensation Act (act), General Statutes § 31-275 et seq. The commissioner also granted the plaintiff's motion to preclude. As a result, the defendant was precluded from contesting liability[6] for the plaintiff's claimed injury to

[3] "A form 30C is the form prescribed by the workers' compensation commission of Connecticut for use in filing a notice of [a workers' compensation] claim . . . ." (Internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 92, 94 n.3, 144 A.3d 530 (2016).

[4] "A form 43 is a disclaimer that notifies a claimant who seeks workers' compensation benefits that the employer intends to contest liability to pay compensation. If an employer fails timely to file a form 43, a claimant may file a motion to preclude the employer from contesting the compensability of his claim. . . . The form 43 generally must be filed within twenty-eight days of receiving written notice of the claim. See General Statutes § 31-294c . . . ." (Citation omitted; internal quotation marks omitted.) *Wiblyi* v. *McDonald's Corp.*, 168 Conn. App. 77, 79 n.2, 144 A.3d 1075 (2016).

[5] We have described a motion to preclude in this context as "a statutorily created waiver mechanism that, following an employer's failure to comply with the requirement of [General Statutes] § 31-294c (b), bars that employer from contesting the compensability of its employee's claimed injury or the extent of the employee's resulting disability." (Internal quotation marks omitted.) *Dominguez* v. *New York Sports Club*, 198 Conn. App. 854, 865, 234 A.3d 1017 (2020).

[6] See, e.g., *Dominguez* v. *New York Sports Club*, 198 Conn. App. 854, 864, 234 A.3d 1017 (2020) (employer who fails to contest liability and commence payment for alleged injury on or before twenty-eighth day shall be conclusively presumed to have accepted compensability for alleged injury and this

his right shoulder and from contesting the extent of any resulting disability. The commissioner further ordered the plaintiff to provide a list of benefits claimed and noted that, if the parties were unable to reach an agreement as to the benefits owed to the plaintiff, a formal hearing would ensue. At that hearing, the plaintiff would be required to prove his claims as to compensability, the extent of his disability and entitlement to benefits;[7] however, as a result of the granting of the motion to preclude, the defendant would be "barred from offering exculpatory evidence into the record, from examining witnesses, from commenting on evidence offered by the [plaintiff] or making argument."[8] This appeal, initially filed in 2014, followed.[9]

We begin by setting forth the relevant legal principles. "The purpose of the [act] is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer . . . . The [act] compromise[s] an employee's right to a [common-law] tort action for work related injuries in return for relatively quick and certain compensation. . . . The act indisputably is a remedial statute that should be construed generously to accomplish its purpose. . . . The humanitarian and remedial purposes of the act counsel against an overly narrow construction that unduly limits

conclusive presumption cannot be overcome by any additional evidence or argument); *Woodbury-Correa* v. *Reflexite Corp.*, 190 Conn. App. 623, 628–29, 212 A.3d 252 (2019) (if commissioner determines that employee's notice of claim is adequate on its face and that employer failed to comply with [General Statutes] § 31-294c, then motion to preclude must be granted).

[7] See, e.g., *Donahue* v. *Veridiem, Inc.*, 291 Conn. 537, 545–47, 970 A.2d 630 (2009).

[8] But see *Del Toro* v. *Stamford*, 270 Conn. 532, 543, 853 A.2d 95 (2004) (conclusive presumption does not prevent employer from contesting liability when issue of lack of subject matter jurisdiction has been presented squarely to commissioner).

[9] Resolution of this appeal was delayed pursuant to a bankruptcy stay, which was lifted on December 1, 2020.

eligibility for workers' compensation. . . . Further, our Supreme Court has recognized that the state of Connecticut has an interest in compensating injured employees to the fullest extent possible . . . .

"The principles that govern our standard of review in workers' compensation appeals are well established. . . . The board sits as an appellate tribunal reviewing the decision of the commissioner. . . . [T]he review [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . *[T]he power and duty of determining the facts rests on the commissioner . . . . [T]he commissioner is the sole arbiter of the weight of the evidence and the credibility of witnesses . . . . Where the subordinate facts allow for diverse inferences, the commissioner's selection of the inference to be drawn must stand unless it is based on an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . .*

"This court's review of decisions of the board is similarly limited. . . . The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [W]e must interpret [the commissioner's finding] with the goal of sustaining that conclusion in light of all of the other supporting evidence. . . . *Once the commissioner makes a factual finding, [we are] bound by that finding if there is evidence in the record to support it.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *Jones* v. *Connecticut Children's Medical Center Faculty Practice Plan*, 131 Conn. App. 415, 422–24, 28 A.3d 347 (2011); see also *Leonetti* v. *MacDermid, Inc.*, 310 Conn. 195, 205–206, 76 A.3d 168 (2013).

On appeal, the defendant first challenges certain factual findings made by the commissioner.[10] Specifically, she contends that the commissioner erred in finding that (1) the plaintiff was injured in the course of his employment and was unable to work, (2) an employer-employee relationship existed, and (3) a sufficient quantity of snow existed that required the plaintiff to engage in the act of shoveling.

We carefully have reviewed the record before us and conclude that the defendant cannot prevail on her challenges to the fact-finding[11] and credibility determinations[12] made by the commissioner. The commissioner expressly found that the alleged injury suffered by the plaintiff while shoveling snow at the defendant's property, if proven, would constitute a compensable injury under the act, assuming that he was an employee of the defendant.[13] The commissioner further found that,

[10] The defendant filed a motion to correct the factual findings of the commissioner pursuant to § 31-301-4 of the Regulations of Connecticut State Agencies, and, therefore, is not prohibited from challenging those findings before the board or this court. See, e.g., *DeJesus* v. *R.P.M. Enterprises, Inc.*, 204 Conn. App. 665, 686, 255 A.3d 885 (2021); *Melendez* v. *Fresh Start General Remodeling & Contracting, LLC*, 180 Conn. App. 355, 367–68, 183 A.3d 670 (2018).

[11] We emphasize that the power and duty for determining the facts and the conclusions drawn therefrom rests with the commissioner in a workers' compensation case. See *Orzech* v. *Giacco Oil Co.*, 208 Conn. App. 275, 281, A.3d (2021); see also *Marandino* v. *Prometheus Pharmacy*, 294 Conn. 564, 572, 986 A.2d 1023 (2010); *Six* v. *Thomas O'Connor & Co.*, 235 Conn. 790, 798, 669 A.2d 1214 (1996).

[12] "It is within the discretion of the commissioner alone to determine the credibility of witnesses and the weighing of the evidence. It is . . . immaterial that the facts permit the drawing of diverse inferences. The [commissioner] alone is charged with the duty of initially selecting the inference which seems most reasonable, and [the commissioner's choice], if otherwise sustainable, may not be disturbed by a reviewing court." (Internal quotation marks omitted.) *Ayna* v. *Graebel/CT Movers, Inc.*, 133 Conn. App. 65, 71, 33 A.3d 832, cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012); see also *McFarland* v. *Dept. of Developmental Services*, 115 Conn. App. 306, 322, 971 A.2d 853, cert. denied, 293 Conn. 919, 979 A.2d 490 (2009).

[13] "[I]t is well settled that, because the purpose of the act is to compensate employees for injuries without fault by imposing a form of strict liability

at the time of this alleged injury, the plaintiff was an employee of the defendant.[14] See, e.g., *DeJesus* v. *R.P.M. Enterprises, Inc.*, 204 Conn. App. 665, 694–97, 255 A.3d 885 (2021); *Rodriguez* v. *E.D. Construction, Inc.*, 126 Conn. App. 717, 727–28, 12 A.3d 603, cert. denied, 301 Conn. 904, 17 A.3d 1046 (2011). Evidence exists in the record to support these findings. Cognizant of our limited role, we conclude that the defendant's challenges to the facts found by the commissioner are without merit.

on employers, *to recover for an injury under the act a plaintiff must prove that the injury is causally connected to the employment. To establish a causal connection, a plaintiff must demonstrate that the claimed injury (1) arose out of the employment, and (2) in the course of the employment.* . . . Proof that [an] injury arose out of the employment relates to the time, place and circumstances of the injury. . . . Proof that [an] injury occurred in the course of the employment means that the injury must occur (a) within the period of the employment; (b) at a place the employee may reasonably be; and (c) while the employee is reasonably fulfilling the duties of the employment or doing something incidental to it." (Emphasis added; internal quotation marks omitted.) *Sapko* v. *State*, 305 Conn. 360, 371–72, 44 A.3d 827 (2012); see also *Jones* v. *Connecticut Children's Medical Center Faculty Practice Plan*, supra, 131 Conn. App. 423.

[14] Our Supreme Court has "stated that [t]he fundamental distinction between an employee and an independent contractor depends upon the existence or nonexistence of the right to control the means and methods of work. . . . The test of the relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent. . . . An employer-employee relationship does not depend upon the actual exercise of the right to control. The right to control is sufficient. . . . The decisive test is who has the right to direct what shall be done and when and how it shall be done? Who has the right of general control? . . . Under this test, we have stated that [a]n independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his or her employer, except as to the result of his work." (Citation omitted; internal quotation marks omitted.) *Standard Oil of Connecticut, Inc.* v. *Administrator, Unemployment Compensation Act*, 320 Conn. 611, 623, 134 A.3d 581 (2016).

In the present case, the board noted that the commissioner concluded, after a "thorough review of the facts and law" that the plaintiff was not an independent contractor at the time of his claimed injury and that this conclusion was reasonable. Specifically, the board found that the defendant's decision to install time clocks and to establish policies as to the time,

Next, the defendant claims that, under these facts, she could not file a form 43 to contest liability and, therefore, the court improperly granted the plaintiff's motion to preclude. Specifically, she contends that the filing of a form 43, when she allegedly knew the plaintiff's claim to be fraudulent, would have constituted a criminal act punishable pursuant to § 31-290c.[15] Specifically, she contends that, had she filed a form 43, she would have "intentionally aided, abetted and facilitated fraudulently obtained payments [for the plaintiff]." We are not persuaded by this novel interpretation of § 31-290c.[16]

place, and manner that work was to be performed at her properties "clearly demonstrate[d] that she asserted the right to control the [plaintiff's] work, and he was no longer acting in an autonomous manner."

[15] General Statutes § 31-290c provides: "(a) Any person or his representative who makes or attempts to make any claim for benefits, receives or attempts to receive benefits, prevents or attempts to prevent the receipt of benefits or reduces or attempts to reduce the amount of benefits under this chapter based in whole or in part upon (1) the intentional misrepresentation of any material fact including, but not limited to, the existence, time, date, place, location, circumstances or symptoms of the claimed injury or illness or (2) the intentional nondisclosure of any material fact affecting such claim or the collection of such benefits, shall be guilty of a class C felony if the amount of benefits claimed or received, including but not limited to, the value of medical services, is less than two thousand dollars, or shall be guilty of a class B felony if the amount of such benefits exceeds two thousand dollars. Such person shall also be liable for treble damages in a civil proceeding under section 52-564.

"(b) Any person, including an employer, who intentionally aids, abets, assists, promotes or facilitates the making of, or the attempt to make, any claim for benefits or the receipt or attempted receipt of benefits under this chapter by another person in violation of subsection (a) of this section shall be liable for the same criminal and civil penalties as the person making or attempting to make the claim or receiving or attempting to receive the benefits."

[16] "[It] is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the con-

In her brief to this court, the defendant offers no support for her argument that the mere act of filing a form 43 would have constituted criminal conduct. Our Supreme Court has explained that § 31-290c "criminalizes the behavior of a person who makes a claim or obtains an award based in whole or part on a material misrepresentation or intentional nondisclosure of material fact, and it also confers the right to bring a cause of action for statutory theft pursuant to General Statutes § 52-564." *Leonetti* v. *MacDermid, Inc.*, supra, 310 Conn. 217–18; see also *Dowling* v. *Slotnik*, 244 Conn. 781, 815, 712 A.2d 396, cert. denied sub nom. *Slotnik* v. *Considine*, 525 U.S. 1017, 119 S. Ct. 542, 142 L. Ed. 2d 451 (1998). Likewise, it applies to an employer that prevents or attempts to prevent the receipt of benefits or reduces or attempts to reduce the amount of benefits based on a material misrepresentation or intentional nondisclosure of a material fact. See, e.g., *Desmond* v. *Yale-New Haven Hospital, Inc.*, 138 Conn. App. 93, 100, 50 A.3d 910 (plaintiff claimed that defendants prevented, or attempted to prevent, receipt of benefits or reduced or attempted to reduce amount of benefits by casting workers' compensation claims in false light by making certain misrepresentations), cert. denied, 307 Conn. 942, 58 A.3d 258 (2012).

In addition to the absence of any legal support for the defendant's claim, we are unable to discern any logical basis for her position that filing a form 43 would

struction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Internal quotation marks omitted.) *Brocuglio* v. *Thompsonville Fire District #2*, 190 Conn. App. 718, 734, 212 A.3d 751 (2019); see also *Barker* v. *All Roofs by Dominic*, 336 Conn. 592, 598–99, 248 A.3d 650 (2020); see generally *Del Toro* v. *Stamford*, 270 Conn. 532, 539, 853 A.2d 95 (2004) (when workers' compensation appeal involves issue of statutory construction that had not yet been subjected to judicial scrutiny, appellate courts employ plenary review).

have subjected her to potential criminal liability or prosecution. The purpose of filing this document is to contest an employer's liability for an employee's injury. It would not, therefore, fall within the language of § 31-290c that criminalizes conduct by a claimant for workers' compensation benefits. Furthermore, her contention is premised on her own assertion that the plaintiff used a material misrepresentation or an intentional nondisclosure of a material fact to obtain such benefits improperly. Thus, she would not fall within the ambit of the prohibition in § 31-290c against an employer's prevention, or attempt to prevent, the receipt of benefits, or reduction therefrom on the basis of the employer's material misrepresentation or intentional nondisclosure of a material fact. For these same reasons, the filing of a form 43 in this case would not have constituted a violation of § 31-290c (b). In sum, the defendant's contention that her filing of a form 43 in this case would constitute criminal activity is without merit.

The decision of the Compensation Review Board is affirmed.